



REPUBLIC OF KENYA

IN THE HIGH COURT

AT KISUMU

Criminal Appeal 289 of 2008

BETWEEN

SAMWEL AMADI KANGAI APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from a judgment of the High Court of Kenya at Kisii (Musinga, J) dated 19th December, 2008

In

H.C. Cr. C. No. 13 of 2006)

JUDGMENT OF THE COURT

Musinga, J, sitting in the High Court at Kisii tried and convicted **Samuel Amadi Kangai**, hereinafter “the appellant”, on an Information that had charged him with murder contrary to **section 203** as read with **section 204** of the Penal Code. The particulars contained in the Information were that on the 16th of January, 2006 at Nyagina area in Rusinga East Location of the then Suba District of the then Nyanza Province, the appellant murdered Linet Atieno, hereinafter “the deceased”. The appellant was, upon the conviction, duly sentenced to death. He now appeals to the Court against the conviction and sentence and since his appeal is a first appeal, it is our duty to re-evaluate and re-analyze the whole evidence placed before the trial Judge and reach our own conclusions in deciding whether or not the conviction recorded by the High Court is supportable. In doing so, we must bear in mind that while the trial Judge had the opportunity to see and hear the witnesses testify before him, we do not have that advantage and we must give due allowance for that factor – see for example **OKENO VS. REPUBLIC [1972] EA 32**. There the Court of Appeal for East Africa, the predecessor of this Court, laid it down that:-

“it is the duty of a first appellate court to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld.”

The facts underlying the case were that on the evening of 16th January, 2006 at about 7.00 p.m. Jack Ochieng’ Aloo (PW1), who worked in a butchery at Mbita was on his way home. When he reached a place which he identified as Nyagina Ice Plant (factory), he met one Ogwang who was with his wife. It appears from the record that the deceased was the person Jack was calling Ogwang’s wife. He accompanied them for a short time but he then passed them and went ahead of them. There was electric light coming from the Ice Plant. The Plant was about 30 metres from where Jack was. Then to quote Jack:

“Suddenly, a person passed me. He was wearing a brownish jacket and a short pair of trousers. After he passed me, he turned and started coming towards us. He threatened to kill me. He removed a panga from his jacket and slashed my forehead. He told me that he was sorry because the attack was not directed at me. I ran towards the hospital. I left the assailant chasing Ogwang and his wife.”

Millicent Adhiambo Odhiambo (PW4) lived by the road side where the commotion involving Jack was taking place. At about 9.00 p.m., Millicent heard her neighbour Bob Otieno screaming. Bob Otieno gave evidence as PW7. The effect of their evidence was that they heard the commotion, went to the road and found the deceased lying down; the deceased had severe panga cuts on her body though she was not dead, and was still able to talk. The two witnesses were joined at the scene by Rose Atieno Ramogi (PW8). Rose knew the deceased who was some kind of a relative. Rose knew that the deceased had been married to some other man at Ndhiwa but that the appellant had lured the deceased away from that marriage and lived with the deceased as husband and wife for sometime. There were, however, disputes between the appellant and the deceased. All the three witnesses, namely Millicent, Bob and Rose swore that the deceased spoke at the scene before she died and that she named the person who had “killed her.” Millicent put it this way:-

“----- Nyamumbo [Rose] identified the lady who was lying down. She said it was Samuel Kangai who had killed her. Nyamumbo asked her what was the relationship between the two of them. She said Samuel was her brother-in-law. She continued to say Samuel Kangai you have killed me. She said that it was Samuel who had lured her to Mbita. She further said that she went ahead and looked for another husband. She also said that she got Samuel a sister to her brother so that Samuel could leave her alone but Samuel was still pursuing her. She said that if she dies she should be buried in her husband’s place at Ndhiwa. ----- I left the scene after she died.”

For his part, Bob put it this way:

“A certain lady brought a lantern lamp. We saw a lady lying on the ground. The lady groaned and after a while started crying. She was asked who she was. She said she was Linet. The woman we were with called Nyamumbo said that the injured was a wife to Nyamumbo’s cousin. We asked her who had attacked her. She mentioned the name Samuel Kangai. She said that in case she died, she should be taken to Ndhiwa where she was married for burial. She went on groaning. ----- The lady died shortly thereafter.”

Rose for her part said:-

“On 16/1/2006 at about 7.00 p.m. I was lighting a jiko. I heard screams from the direction where Linet was staying. Somebody asked ‘Why is that man killing that lady?’ I rushed towards that place carrying a lamp. I found Linet sleeping (sic) facing down. I cried and asked who had taken her there. The deceased said, ‘Samuel, Samuel why are you killing me, yet you took me from my husband? She said that she should not be left to rot there; she should be taken back to Ndhiwa where her husband lived. She had earlier told me that the accused lured her from her husband. She asked me to call Akoth’s father who was my brother-in-law.”

It is clear from these extracts that while the three witnesses did not see who had attacked the deceased, a

big plank of the prosecution case against the appellant was that the deceased herself made a dying declaration to the three witnesses and that in the dying declaration, the deceased named the appellant as her assailant. Jack (PW1) did not know the appellant before but he (Jack) later on the 3rd February, 2006, identified the appellant at an identification parade conducted by Chief Inspector Merengo Mwarai (PW9).

The other plank of the prosecution's case consisted of the evidence of James Otieno Katete (PW5) and Gabriel Oneko Ocheke (PW3). Gabriel was the then chief of the area. He received the appellant from James who had taken the appellant to the chief's camp. The evidence of Gabriel that the appellant confessed to him that he (appellant) had killed the deceased was clearly inadmissible and the learned Judge was in error in admitting that evidence. Gabriel was a chief and a person in authority over the appellant and was not entitled to take a confession from the appellant - see sections 25A and 26 of the Evidence Act. But James was in a different position from Gabriel; James was a fisherman and was assisting the chief in community policing. We do not think James could be described as a person in authority over the appellant. The evidence of James was as follows:-

“On 17/1/2006 in the morning I went to a shop. I heard that a certain lady had been murdered. The shop is in Wasario. I went to the scene and saw the body. The body was lying on the road. I went to the chief's camp. The information had not been received by the chief. On my way home, I saw a certain man sitting next to a fence. He was wearing white short and his right knee had a fresh cut wound. I cannot remember whether he had a shirt. I started interrogating him. I asked him what had happened to him. He said he had been cut by somebody. He said that he had only Shs.50/-. I had known that person before. I asked him to accompany me. We started talking. I asked him whether he knew anything about the incident regarding the murdered woman. He told me he knew about the murder. He told me that he was the one who had killed her because he found her with another person. We proceeded to the chief's camp. We found the head master of a school. ----- . The chief came after a short while. He interrogated the suspect who admitted that he was the one who had murdered the woman. -----.”

As we have seen, the prosecution based its case against the appellant on three broad planks, namely:-

- (i) That Jack (PW1) saw him at the scene of the attack where the appellant attacked Jack himself and that Jack ran away leaving the appellant chasing the deceased and Ogwang. Jack subsequently identified the appellant at an identification parade.
- (ii) That before she died the deceased made a dying declaration in the presence of Millicent, Bob and Rose and that in her dying declaration, the deceased named the appellant as her assailant.
- (iii) That the appellant confessed the crime to James.

Upon that evidence the learned Judge placed the appellant upon his defence, the Judge wrongly citing **section 211** of the Criminal Procedure Code as the legal basis for his action. That section applies to trials in the subordinate courts and the relevant provision in respect of trials in the High Court is **section 306** of the Code. This, however, occasioned to the appellant no miscarriage of justice and we merely mention it to put the record straight.

In his unsworn statement, the appellant told the Judge that on the 16th January, 2006, he left his house at 5.00 p.m. to go fishing. In the morning they returned from the fishing and sold their catch. He then went to the hospital for treatment as he had been injured in the boat on his right leg. On the way to the hospital, he met the chief who stopped him and told him that he (the chief) had been looking for him (appellant). He was arrested and taken to the police station. The officer in charge of the station told him about the murdered woman and he (appellant) said he knew nothing about that. He was thereafter charged with murder. According to the appellant, Rose said the deceased was his wife; Rose lied. The deceased was his wife's aunt. Deceased was trading in maize and would buy maize from Ndhiwa. The deceased was his relative and would come to his house for a visit and the last time the appellant saw her was in February, 2005. The appellant said she had differences with Rose (PW8). He used to work for Rose and

fishing nets were stolen. When he reported the matter to Rose, she accused him of stealing the nets, arrested him and took him to the elders. Rose lost the case but told him that he would “see” one day. He knew nothing about the death of the deceased.

Those were the conflicting versions which were put before the learned Judge for his resolution. Having set out the two versions, the learned Judge considered them and resolved as follows:-

“The cause of the deceased’s death is not in dispute. She was severely assaulted by a person with a panga. Several people saw her shortly after the attack before she died. Among those people were PW4, PW7 and PW8. They all said the deceased said that she had been assaulted by the accused. The deceased made a dying declaration. PW8 knew both the accused and the deceased. The witness testified that the accused and the deceased had a love affair that went sour. When PW8 heard the deceased making her dying declaration, she knew whom she was referring to when she said that it was Samuel, the one who had lured her from her husband.”

Even though the accused said that PW8 had a grudge against him, he did not have her cross-examined regarding the alleged grudge. The accused had a defence counsel and the witness had recorded her statement which had been availed to the defence counsel long before the trial. I do not, therefore, find the accused defence credible.

“Evidence of a dying declaration is admissible under section 33 (a) of the Evidence Act. ----- The accused also confessed to PW3 and PW5 that he was the one who had murdered the deceased and explained why he did so. PW1 also identified the accused as the person who had assaulted him with a panga before he turned on the deceased and the man she was walking with on the material night. There was sufficient light at the scene to enable PW1 positively identify the accused.”

The learned Judge then convicted him and sentenced him to death.

The appellant’s appeal before this Court was urged by his counsel Mr. Mwamu, who premised it on the “*Supplementary Grounds of Appeal*” lodged by him on the 17th November, 2011. The first issue was one purely on law, that the appellant’s rights under **section 72 (3)** of the old Constitution of Kenya were violated and therefore, the appellant was not accorded a fair hearing. Mr. Mwamu contended that the appellant was arrested on the 17th January, 2006 and was not produced in court until the 11th April, 2006 and that there was no attempt by the prosecution to explain the delay of some 84 days according to counsel, when the appellant was held in police custody. The then **section 72 (3)** of the repealed Constitution had allowed the prosecution a maximum of fourteen days during which they could hold a suspect in capital charge in their custody before producing him in court. Mr. Gumo, the learned Assistant Deputy Public Prosecutor, countered this contention by Mr. Mwamu by pointing out that right from the beginning of his trial and throughout the trial, the appellant was represented by counsel and no such complaint was raised by counsel on his behalf. Had such a complaint been raised on behalf of the appellant, the prosecution might have given an answer and the learned trial Judge would have had to resolve the issue, one way or the other. We think Mr. Gumo’s contention was based on this Court’s decision in **JAMES GITHUI WAITHAKA & ANOTHER VS. REPUBLIC**, Criminal Appeal No. 115 of 2007 (unreported), and we wholly agree with him and have nothing to add to the conclusions made in the cited case. We reject this ground of appeal.

The next issue argued by Mr. Mwamu was with regard to the evidence itself. He raised the question of identification of the person who first attacked Jack and who the prosecution contended attacked the deceased and Ogwang after Jack had run away. Mr. Mwamu correctly pointed out that witnesses such as Bob and Rose had to bring to the scene a torch and a lantern in order to identify the deceased who was lying on the ground and the inference to draw from this point was that the attack took place when it was dark and the weather must have been cloudy because the witness said they had to leave the scene because of rain. Jack himself said the attack was at around 7. 00 p.m. while Bob himself said he heard the commotion on the road at about 9.00 p.m. Whatever may have been the correct time, the attack on the deceased was at night and it was dark. Mr. Mwamu contended that because of the darkness, Jack and even the deceased herself could not have identified the attacker, and the identification of the appellant by Jack

at the identification parade must have been a mistake. But as Mr. Gumo pointed out in reply, the evidence of Jack was that when the man who subsequently attacked him was passing him, he (Jack) was by the Ice Plant from which there were electric lights. As soon as the man passed Jack, he then started walking back and attacked Jack. They were still by the Ice Plant and Jack was even able to see the clothes the man was wearing. Jack ran away and as he was doing so, the man was chasing the deceased and Ogwang and the chase was obviously away from the Ice Plant. Millicent, Bob and Rose found the deceased in a dark place which was obviously away from the Ice Plant and hence their need for lighting to enable them identify the deceased.

They all said they found the deceased still alive and each witness swore he or she heard the deceased name the appellant as her assailant and gave the circumstances surrounding the attack. Mr. Mwamu cited to us the famous case of **SIMON KIPTUM CHOGE & OTHERS VS. REPUBLIC [1982 – 88] 2 KAR 41** but in that case the dying declaration did not give the name of the person who had attacked the deceased Tenai. The report of that case says:

“As he was about to enter the police Land Rover, Tenai said pointing at Choge’s farm, ‘we have been killed by this rubbish’”

That was all the identification of the killer given in the dying declaration. In the appeal before us, all the three witnesses Millicent, Bob and Rose said the deceased had specifically mentioned the appellant’s name as Samuel Kangai. Millicent and Bob did not know who Samuel Kangai was but Rose knew him and the circumstances under which the appellant and the deceased had come to be together. Like the learned trial Judge, we are also satisfied on the recorded evidence that the deceased made a dying declaration in the hearing of the three witnesses and that the deceased specifically mentioned the appellant as her assailant. The attack on Jack and on the deceased and her companion had started when the parties were still near the Ice Plant which had electric lights and the deceased who knew the appellant well must have recognized him. He chased them and attacked her when she was far from the Ice Plant where there was no lighting.

Even if we were to look for corroboration of the dying declaration, there was the evidence of James (PW5) regarding what the appellant told him about the death. James was an ordinary citizen like the appellant and he could not have helped hearing what the appellant was saying. James had no authority at all over the appellant. The appellant had a fresh wound on his leg and James asked him what had caused the wound and the appellant said he had been cut by somebody. The appellant did not tell James that he had been injured in a boat during his night fishing as he was eventually to tell the learned Judge in his unsworn statement. The Judge accepted the evidence of James as he did that of the other witnesses. We can find no legal basis upon which we can hold that the evidence of the prosecution witnesses was not believable and ought not to have been accepted by the Judge. The evidence of the prosecution was clearly credible and was rightly accepted by the Judge and the appellant’s unsworn statement raising, in effect, the defence of an alibi, was for rejection and was correctly rejected. We agree with the learned trial Judge that the prosecution proved beyond any reasonable doubt that the appellant with malice aforethought hacked the deceased to death using the same panga that he used to slash Jack. The cut on his leg must have been caused by the other man who was in the company of the deceased and whom, for some reason of their own, the prosecution failed to call as a witness. That failure, however, did not in any way weaken the consistent and overwhelming prosecution evidence that it was the appellant who attacked and killed the deceased.

Accordingly, and for the reasons we have stated, the appellant’s appeal against his conviction must fail and is hereby dismissed. The sentence imposed was lawful and we confirm the same.

Dated and delivered at Kisumu this 22nd day of March, 2012.

R.S.C. OMOLO

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.