REPUBLIC OF KENYA

COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 308 OF 2009

STEPHEN MARWA MWITA MWISARI…….……...APPELLANT

AND

REPUBLIC…….....…….....….RESPONDENT

(Appeal from conviction and sentence of the High Court of Kenya at Kisii (Musinga, J) dated 24th July,2009.

in
H.C.CR.C.NO. 19 of 2005)
****
JUDGMENT OF THE COURT

The appellant ***Stephen Marwa Mwita Mwisari*** was arraigned before the High Court of Kenya at Kisii with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code, in that **Stephen** ***Marwa Mwita Mwisari*** on the 17th day of January 2005, at Masangura Sub-Location in Kuria District within the Nyanza Province murdered ***Ayub Magasi Chacha (the deceased)***. The appellant pleaded not guilty but after trial before the High Court at Kisii, he was convicted and sentenced to death.

The prosecution led evidence that the deceased ***Ayub Magasi Chacha*** left his home at 6.00 a.m. informing his wife PW5, ***Susan Boke Magazi*** that he was leaving for Daraja Mbili to buy maize. At about 2.30 p.m. on the same day the appellant appeared at the office of the area Assistant Chief, PW2, ***Mr. Chacha Marwa Sasi*** where the said Assistant Chief was expected to arbitrate in a case between the appellant and the deceased with regard to a refund of 2 heads of cattle paid as dowry for the deceased's daughter whom appellant had allegedly married but apparently they had disagreed and she had gone back to her parents.

Evidence was given that indeed the deceased showed up at the Chief's Office and PW2 accordingly appointed a panel of elders to resolve that dispute but then the deceased stormed out of the meeting saying that the matter was with the police. The appellant left five minutes after the deceased's departure. Ten minutes later after the appellant's departure from PW2's office, screams were head by the roadside.

PW2, PW3, PW4 and PW5 rushed to the scene and upon arrival they found the deceased lying in a pool of blood with multiple cuts consisting of an almost severed right hand only held by the skin, cuts on the head, mouth, left wrist and right knee. Besides the mentioned witnesses, there were other members of the public present. PW3 alleges to have seen the appellant assault the deceased. PW4 on the other hand inquired from the deceased as to who had assaulted him and he said Stephen.

PW2 reported the matter to Ntimaru police station where the report was received by PW8 who visited the scene with PW9. They rushed the deceased to hospital at Pastor Machage Memorial Hospital where he died even before receiving treatment. On 20th January, 2005 PW6 ***Joanes Chacha*** while in the company of PW9 No.48068 ***P.C. Henry Wanyonyi*** identified the body of the deceased to PW10 ***Dr. Aggrey Indagiza*** for post mortem. PW10 made observations that the deceased was aged about 36 years; he had died about 3 days earlier; had amputation of the right upper arm; the blood vessel to the upper limb had been severed from the right humerus; he had cut wounds on the right wrist joint; he had a deep cut wound on left patella; a cut across the mouth; the cardiovascular system had collapsed. PW10 formed the opinion that the cause of death was cardiovascular collapse secondary to excessive bleeding due to cut wounds.

The appellant on the other hand gave unsworn evidence to the effect that on 17th January, 2005 he was summoned to the Chief's Office in connection with a case in which he was complaining about dowry he had paid to the deceased. The appellant allegedly arrived at the Chief's office at 8.00 a.m. followed shortly thereafter by the deceased at 9.00 a.m. and when the deceased stormed out of the meeting the appellant also left. He remained at home till the day he was arrested by PW7 in connection with this offence.

This appeal is from both that conviction and sentence. In his petition of appeal, the appellant has listed 9 grounds of appeal, namely:-

1. The learned trial Judge erred in convicting the accused person on the evidence of a dying declaration of PW4 without proof of the same.

2. The learned trial Judge erred in convicting the accused person based on circumstantial evidence without any basis in law.

3. The learned trial Judge erred in law and in fact in failing to find that there was no evidence linking the accused to the offence.

4. The learned trial Judge erred in law and in fact in failing to find that no evidence was tendered to prove that the accused attacked the deceased.

5. The learned trial Judge erred in law and in fact in failing to find that the prosecution did not prove *actus reus*.

6. The learned trial Judge erred in law and fact in convicting the accused person of the offence of murder based on hearsay evidence.

7. The learned trial Judge erred in law and in fact in sentencing the accused person on the evidence of one witness only without considering the veracity of the evidence.

8. The learned trial Judge erred in law in not paying any or sufficient consideration to the defence of the appellant.

9. The learned trial Judge erred in law and in fact in displacing the standard of proof required in convicting the Appellant for the offence of murder.

At the hearing of this appeal the appellant was represented by learned counsel Mr. Tom Olando, while the State was represented by learned counsel Mr. P. Kiprop. In his oral address to the Court Mr. Olando, learned counsel for the appellant, submitted that it is common ground that there was a dispute between the appellant and the deceased over refund by the deceased to the appellant of dowry for the deceased's daughter who had deserted the appellant but there is no way the appellant could have attacked the deceased as the deceased left the Chief's office earlier; that the learned trial judge erred in relying on contradictory evidence of a dying declaration allegedly made by the deceased which he should have treated with caution; that there is no evidence that police had in fact been looking for the appellant after

the incident in order to justify a finding of guilty conduct; that the alleged circumstantial evidence had not been established to the required standard and that on the totality of the evidence adduced, the prosecution had not discharged its duty of proving the appellant\'s guilt beyond reasonable doubt.

To fortify his submissions, counsel urged us to be guided by principles enunciated in the cases of ***Kihara versus Republic Criminal Appeal No.54 of 1985***, ***Marrie & 3 Others versus Republic [1986] KLR 224*** and ***Kariuki versus Republic [1986] KLR 196.***

The learned state counsel on the other hand urged us to dismiss the appeal in its entirety because on the evidence of the deceased's dying declaration, the appellants conduct of disappearing from the vicinity after the incident and circumstantial evidence adduced by the prosecution all of which the trial Judge properly assessed, established the appellant's guilt beyond reasonable doubt.

We have considered these submissions and carefully read the record of appeal. This being a first appeal we are reminded of our obligation as a first appellate court revisiting the evidence that was tendered before the trial Judge, analyze the same and arrive at our own independent conclusions bearing in mind the fact that we neither saw nor heard the witnesses and make an allowance for that. The authority for this is the case of **Muthoka & Another versus Republic [2008] KLR 297.**

In discharging this duty, we have given due consideration and reassessed the evidence on record, the grounds of appeal presented by the appellant to us for determination, the rival submissions by learned counsel on both sides and the authorities they cited. In our opinion the appellant\'s complaints can be clustered into four broad grounds, namely:

(a) That the learned Judge shifted the burden of proof to the appellant;

(b) That the learned Judge\'s wrongly relied on the evidence of a dying declaration to found a conviction;

(c) That the learned Judge erred in attaching undue weight to the alleged circumstantial evidence to found a conviction; and

(d) That the learned Judge erroneously relied on the evidence of a single witness.

The principles of law applicable to all these grounds are now well settled in law. On the first one of burden of proof, it is trite law that an accused person is not obliged to adduce evidence to support his defence or give any explanation. The burden of proof always remains with the prosecution to prove the accused guilty beyond reasonable doubt. (See ***Muiru versus Republic [1983] KLR 205***.

In this case we having re-evaluated the evidence on record we find that the learned Judge did not shift the burden of proof to the appellant as he claimed. All that the learned trial Judge did was to reject the appellants defence as a mere denial. In his defence the appellant raised the issue of existence of bad blood between him and PW3, the only witness who mentioned the appellant in connection with actual assault of the deceased. The appellant was represented by counsel. No where in cross-examination of PW3 was the appellant's claim of bad blood put to PW3. To us the only reasonable inference which can be drawn from that failure is that the claim was an after thought. Once these are discounted what is left of the appellant defence is a mere denial. The learned trial Judge was therefore perfectly in order in holding so and we uphold that finding.

On the weight to be attached to a dying declaration, we find that the learned trial Judge rightly drew inspiration from the decision of this court in the cited case of ***Choge versus Republic [1985] KLR 1*** wherein it was held inter alia that: -

"the general principle on which a dying declaration is admitted in evidence is that it is a declaration made in extremely when the maker is at the point of death and the matter is induced by the most powerful consideration to tell the truth."

We also wish to take note of the decisions of the same court in the case of ***Kihara versus Republic [1986] KLR 473*** wherein it was held inter alia that: -

"Even though there is no rule that a dying declaration must be corroborated, a court needs to caution itself that in order to obtain a conviction upon a dying declaration, it must be satisfactorily corroborated and particular caution must be exercised as to when the attack took place, the identification of the appellant and the weapon used. Before a dying declaration is relied upon it has to be shown that death was imminent and directly related to the incident."

In the case of ***Achira versus Republic [2003] KLR 701*** this court again reiterated that: -

"The Court should approach the evidence of a dying declaration with necessary circumspection. It is generally speaking un safe to base a conviction solely on the dying declaration of a deceased person made in the absence of an accused and not subject to cross-examination unless there is *satisfaction* ***corroboration."***

In this case we have on our own revisited that evidence. Although there were several persons said to have gone to the scene soon after screams were heard, only PW4 said the deceased named the appellant as his assailant. We note as correctly found by the learned trial Judge that the appellant took no issue with that evidence. The only issue the appellant took with the prosecution's case was that of bad blood between him and PW3, which we have already dismissed. There is no reason why PW4 could tell lies against the appellants. It is also to be noted that the incident took place in broad daylight and issue of mistaken identity on the part of the deceased does not arise. Taking all these factors into account, we find that the learned trial Judge properly admitted the deceased's dying declaration because it fell into the principle set in the cited case of **CHOGE VERSUS REPUBLIC (SUPRA).** In any case the appellant's conviction was not based solely on the deceased's dying declaration. We therefore dismiss that ground also.

On circumstantial evidence, the criteria to be applied before relying on it to found a conviction were set out by this court in the cases of ***Paul versus the Republic [1980] KLR 100*** and ***Kariuki Karanja versus Republic [1986] KLR 190***. In the former,it was held that: -

"Where the prosecution relies upon circumstantial evidence to establish the guilt of the accused, the inculpating facts must be incompatible with the accuseds' indolence and incapable of explanation upon any other hypothesis other than his guilt."

Reiterating this point in the case of ***Kariuki Karanja versus Republic [1986] KLR 190***, this court stated that:

"in order for circumstantial evidence to sustain a conviction it must point irresistibly to the accused and in order to justify the inference of guilt on such evidence, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The burden of proving the facts justifying the drawing of that inference is on the prosecution"

In this case, there was circumstantial evidence from the fact that both deceased and appellant were familiar with each other; the appellant was demanding refund of the dowry he had paid to the deceased for the deceased's daughter who had deserted him; the incident took place shortly after the deceased had stormed out of the meeting called by PW2 to resolve the issue of dowry refund followed by the appellant; the appellant disappeared from the vicinity of the commission of the crime. We also wish to mention here that the appellant's conviction was not based solely on circumstantial evidence.

The last point raised by the appellant with regard to reliance on the evidence of a single witness. As was stated in the case **Kihara versus Republic (Supra)**: -

"**The prosecution is not compelled to call as many witnesses as there could be as what matters is not**

the number of witnesses but the best sound evidence that can be given in Court."

"Subject to certain well known exceptions a fact may be proved by a single witness but this rule does not lessen the necessity for testing very carefully the evidence of a single witness especially when there is evidence that the conditions favouring a correct identification are difficult."-- **MARRIE AND 3 OTHERS VERSUS REPUBLIC (1986) KLR 224.**

Once again we find that besides the evidence of PW4 there was circumstantial evidence and the deceased's dying declaration as stated above.

On proof of existence of malice afore thought the parameters are provided for in section 206 of the penal code. It provides:-

"Malice afore thought shall be deemed to be established by evidence proving any one or more of the following circumstances:-

(a) An intention to cause the death of or do grievous harm to any person whether that person is the person actually killed or not.

(b) Knowledge that the acct or omission causing death will probably cause the death of or grievous harm to some person whether that person is the person actually killed or not although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused.

(c) Intent to commit a felony.

(d) ….."

As for proof of existence of malice we have no doubt that this has been established by reason of the nature of injuries inflicted which also go to show that the person inflicting the injuries knew or had reason to believe that death would occur.

In the upshot we find no merit in this appeal and we accordingly dismiss it in its entirely.

Dated and Delivered at Kisumu this 11th day of October, 2012.

ALNASHIR VISRAM
…….

JUDGE OF APPEAL

R.N. NAMBUYE
……

JUDGE OF APPEAL

D.K. MARAGA
……
JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR