



REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CORAM: TUNOI, AGANYANYA & VISRAM, J.J.A.

CRIMINAL APPEAL NO. 133 OF 2007

BETWEEN

WILSON HINGA MBURU.....APPELLANT

AND

REPUBLICRESPONDENT

(Appeal from conviction and sentence of the High Court of Kenya at Nairobi (Ombija, J) dated 20th August, 2007

in

H.C.CR.C. NO. 5 OF 2004)

JUDGMENT OF THE COURT

WILSON HINGA MBURU, the appellant, was convicted by the superior court, Ombija J, sitting with assessors in Nairobi for the offence of murder contrary to **Section 203 as read with Section 204 of the Penal Code**.

According to the information filed by the Attorney General, the appellant on 28th November, 1999 at Dagoretti Centre within Nairobi area murdered **Ernest Gichugu Kungu**, the deceased.

From the evidence tendered by the prosecution through six witnesses, the trial court found as proved facts that at about 5.30 am, the deceased, a *matatu* driver, and the appellant, a tout, both went to Flour Mini Hotel for breakfast where they were served with tea, *mandazi* and eggs. Five or so minutes later after they left the hotel, there were shouts to the effect that the deceased had been stabbed and that assistance was needed to rush him to hospital. He never made it as he died on the way.

Before the appellant and the deceased left the hotel, one witness Francis Kinuthia (PW 5) had seen them quarrelling while taking breakfast. An autopsy carried out on the body of the deceased revealed the cause of death as a stab wound to the chest.

The appellant's defence was that though he took breakfast with the deceased on the material day, he never quarrelled with him nor did he leave the hotel together with him. He denied stabbing the deceased or harming him in any way.

At the end of the trial and after summing up to the assessors, the two remaining assessors were split. One assessor returned an opinion that the appellant was guilty as charged while the other one gave a contrary opinion.

In convicting the appellant the learned trial Judge held:

“Against that backdrop of evidence it is clear to me that the deceased and the accused were at the hotel belonging to PW 1. It is equally clear to me, on the evidence of PW 1 and PW 5, that the deceased and the accused took breakfast at the said hotel on the material day. A quarrel erupted and the deceased assaulted the accused. Both parties then left. A few minutes later PW 5 heard deceased asking for assistance to be taken to the hospital. Contemporaneous with the distress call of the deceased, PW 5 saw with the assistance of security light, the accused and another person leaving the scene where deceased was lying on the ground with injuries. On the premises it is clear as day light that the accused and his companion had something to do with the injuries that led to the death of the deceased. The accused harboured a feeling that the deceased was a police informer. Hence the accused had the motive, opportunity and means to injure the deceased and did injure him by stabbing him. I find as a fact that it is the accused who followed the deceased outside the hotel and stabbed him to death.”

The appellant was aggrieved by his conviction and through his learned counsel, Mr Wachira, drew up a supplementary memorandum of appeal raising thirteen grounds to challenge it. These grounds challenge the evidence of PW 5 as unreliable since no one else in the hotel witnessed the quarrel between the appellant and the deceased. These grounds, also, fault the learned Judge for basing conviction on circumstantial evidence without closely and separately examining each link in the chain of evidence which could be put together and a conclusion drawn that the chain of evidence as proved was incapable of explanation on any other reasonable hypotheses than that the appellant was guilty as charged.

Mr Ouya, the learned Deputy Prosecution Counsel, appearing for the State conceded that no malice aforethought had been disclosed and consequently a conviction for murder cannot be sustained on the facts tendered before the trial court. She urged us to find the appellant guilty of manslaughter.

The evidence on record established beyond doubt that both the appellant and the deceased took breakfast together at the hotel. It is doubtful whether there was a quarrel or not between the two as no other witnesses who were there apart from PW 5 testified on it. As to what happened outside the hotel no one for sure knows, as there is no eye witness to the stabbing of the deceased by the appellant.

The learned trial judge based the conviction of the appellant for murder on circumstantial evidence. However, it was his duty to himself and the assessors to specify which circumstances he was relying on and what inferences he was drawing from these circumstances. See ***MWANGI & ANOTHER V REPUBLIC [2004] 2 KLR 32.***

In our view, it was plainly wrong and a misdirection on the part of the learned judge to give to the assessors directions on the general principles applicable to circumstantial evidence without explaining to them the individual circumstances and asking them what inference they thought could be drawn from the circumstance. This misdirection, probably explains the reason for the divergent opinions of the assessors. We are inclined to agree with the second assessor who returned the opinion of “not guilty”.

Upon our independent assessment of the evidence given at the trial court, we are not satisfied that conviction for murder recorded against the appellant was safe.

We accordingly allow the appeal, quash the conviction and set aside the sentence of death. The appellant shall be set at liberty forthwith unless he is held for some other lawful case.

It is so ordered.

Dated and delivered at Nairobi this 6th day of May, 2011.

P. K. TUNOI

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JUDGE OF APPEAL

D. K. S. AGANYANYA

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JUDGE OF APPEAL

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR