



**IN THE COURT OF APPEAL
AT KISUMU**

(CORAM: BOSIRE, GITHINJI & VISRAM, J.J.A)

CRIMINAL APPEAL NO. 349 OF 2010

BETWEEN

PETER NYANYEMI OMWENGA APPELLANT

AND

REPUBLICREPUBLIC

(Appeal from a conviction and sentence of the High Court of Kenya at Kisii (Musinga, J) dated 26th May, 2009

In

H.C. Cr. C. No. 3 of 2005)

JUDGMENT OF THE COURT

The appellant was convicted by the High Court at Kisii for the offence of murder contrary to section 203 as read with section 204 of the Penal Code and sentenced to death. He now appeals against conviction and sentence on four grounds.

The prosecution case against the appellant alleged that the appellant murdered Peter Mose Orangi on 21st November, 2004. The prosecution called six witnesses to support the prosecution case, namely James Gekonge Ondora (PW1) (James Gekonge) who claimed to have seen the appellant stab the deceased, with a knife, Jackson Murauni (PW2), a clinical Officer who examined the appellant and found him to be mentally stable, James Barongo Omwando (PW3) (Barongo) who went to the scene after the deceased was stabbed. Dr. Odigo Stephen (PW4) who produced the postmortem report prepared by Dr. Ogando, P.C. Thomas Kioko (PW5) then stationed at Kisii police station to whom the report was made (investigation officer), and, Vincent Gwaro Orangi (PW6) an elder brother of the deceased who identified the body to the doctor who performed the postmortem.

The key prosecution witness was James Gekonge who testified among other things that on 8th November, 2004, at about 5.00 p.m. he was walking home in the company of Peter Mose Orangi (Deceased) who is his neighbor; that when they arrived near the home of the deceased, the appellant who is also his neighbour emerged from a maize farm holding a knife and a metal bar; that the appellant told the deceased that he had been looking for him and had not traced him; that the deceased asked the appellant why he wanted to attack him; that the appellant did not explain; that the appellant wanted to poke the deceased's eyes with the metal bar but the deceased blocked it; that the appellant drew his knife (a small house knife) and stabbed the deceased on the stomach; that the appellant walked away after stabbing the

deceased; that the deceased walked for about 10 metres and fell down; that Barongo responded to the deceased's call who in turn called Vincent the deceased's brother; that they all took the deceased to hospital and that he reported the incident at the police station on the following day.

This witness testified further on cross-examination by Mr. Ondari, the counsel who appeared for the appellant at the trial that the distance from his home to that of the appellant's home is about 100 metres; that he has a common fence with the deceased; that he is the only person who witnessed the incident; that the incident took less than a minute and that the appellant ran away after stabbing the deceased.

On his part, Barongo testified at the trial that both the appellant and the deceased were his neighbours; that on the material day he was in his home when he heard the deceased calling him; that after about 2 minutes he rushed to where the deceased was calling from; that he found the deceased lying on a footpath about 40 metres away; that the deceased was bleeding from the stomach and that he did not see anybody else at the scene.

The evidence of the investigating officer was also important. He testified at the trial that on 9th November, 2004 the appellant went to the police station at 7.30 a.m. carrying a car alternator, knife and iron bar and reported that he had been assaulted by a person who was stealing the alternator from his vehicle and that he took the knife and the iron bar from the thief. The appellant further claimed that he had internal injuries. The investigating officer took the items which he produced at the trial as exhibits and issued the appellant with a P3 form. The investigating officer further testified that later on the same day two people reported that a person (deceased) had been stabbed with a knife and was admitted at Kisii District Hospital. Thereupon he visited the deceased at the hospital and found that he had a wound on the stomach and a cut on the face. He arrested the appellant on the following day and charged him with the offence of assault causing actual bodily harm which charge was withdrawn after the deceased died on 21st November, 2004 and instead charged the appellant with the offence of murder.

Postmortem revealed that the deceased had a long surgical scar which had been stitched on the stomach, another surgical scar on the right side and stab wound on his side. Dr. Ogando formed the opinion that the cause of death was due to cardiopulmonary arrest due to stab wound on the abdomen.

The appellant in an unsworn statement at the trial stated that he was arrested on 8th November, 2004; that after staying in police cells for two days he was asked if he had made a report that he had been assaulted by someone; that he stated that he had fought with Ratemo, and that when he was taken to court he was told that the person he had fought with had died. He denied that he murdered the deceased.

The trial Judge after narrating the evidence stated:-

“From the evidence on record, it is clear that on the material day PW1 was with the deceased when the accused appeared from a maize plantation and without any provocation proceeded to attack the deceased, having told the deceased that he had been looking for him. The accused was at the time armed with a knife and a metal bar. This was therefore a pre-meditated attack. The evidence of PW1 was well corroborated by that of PW3. The accused's report to PW5 that he had been assaulted by the person who was trying to steal his alternator was intended to be a cover up. The deceased died as a result of a stab wound that was inflicted upon him by the accused. The defence by accused is completely unfounded and I reject the same. I find and hold that it is the accused who murdered the deceased with malice aforethought.”

There are four grounds of appeal, namely that, the trial Judge erred in fact and in law in four respects namely; in finding that the evidence of PW1 was corroborated by the evidence of PW3; in failing to evaluate and analyze the evidence; and in dismissing the appellant's defence; in failing to observe that there was no nexus between the exhibits produced, the crime allegedly committed and the appellant and lastly, in failing to evaluate and analyze the contradictions in the evidence of PW1 and PW3 and the circumstantial evidence and by failing to draw the conclusion that PW1 lied in his evidence. Mr. Otieno, learned counsel for the appellant submitted, among other things, that there is nothing in the evidence of

PW3 which corroborates the evidence of PW1; that the evidence of PW1 and PW3 was contradictory particularly because whereas PW1 said that he was with the deceased PW3 testified that he did not find anybody else other than the deceased at the scene; that the weapons produced by PW5 were not shown to PW1 nor analyzed and that the defence of the appellant was never investigated by the police.

Mr. Gumo, the learned Assistant Director of Public Prosecutions on his part supported the conviction and submitted, among other things, that the incident occurred during broad day light; that the deceased died of stab wounds and that upon death of the deceased the police withdrew the earlier charge of assault against the appellant.

This being a first appeal the Court has a duty to re-appraise the evidence and reach its own independent finding while recognizing that the trial Judge had the advantage of seeing and hearing the witnesses and giving due allowance for this. It is for that reason that the circumstances under which an appellate court can interfere with findings of fact by the trial court which are based on credibility of witnesses are restricted. The principle of law is that an appellate court can interfere in such cases only if no reasonable tribunal could have made such findings or if the findings are based on errors of law.

The trial Judge made a finding that the deceased died as a result of the stab wound. There was the evidence of Barongo that after he was called by the deceased he went to the road side and found the deceased lying down bleeding from the stomach and that he and other people hired a taxi and took him to hospital. Barongo further testified that the deceased was operated on but he died. The investigating officer testified that after receiving the report that a person who had been stabbed with a knife had been admitted at Kisii District Hospital he went there and found that the deceased had a stab wound on the stomach and a cut on the face. The investigating officer further testified that the deceased died on 21st November, 2004. That the cause of death was due to a stab wound on the abdomen was verified by Dr. Ogando who performed the post mortem. There was overwhelming evidence that the deceased was stabbed with a knife on the abdomen on 8th November, 2004; that he was admitted in hospital and died in hospital two weeks later due to the stab wound.

The prosecution case is that it is the appellant who stabbed the deceased. The appellant denies but says that he fought with one Ratemo. The prosecution case on the identity of the assailant is dependent on the evidence of James Gekonge. We have already summarized his evidence. The appellant's case is that the evidence of this witness is unreliable as his evidence and the evidence of Barongo is contradictory. It is submitted that the finding of the trial Judge that the evidence of James Gekonge is "*corroborated*" by evidence of Barongo is erroneous and that there is nothing in the evidence of PW3 which "*corroborates*" the evidence of James Gekonge. That submission with respect is not correct. On our evaluation of the evidence we find that the evidence of James Gekonge and the evidence of Barongo is similar in several respects except on the identity of the assailant. They both say that the incident occurred at about 5.00 p.m. near the home of the deceased; that both of them are neighbours of the deceased; that the appellant is also a neighbour of the deceased; that the deceased had an injury on the stomach, that the deceased called for help; that Barongo went to the scene; and that the deceased was not able to talk; that Barongo sent for Vincent Orangi the deceased's brother and that the deceased was taken to hospital.

It is submitted that James Gekonge was not at the scene because Barongo testified that when he went to the scene he did not see anybody else at the scene and that he was the first person to see the deceased. It is not, however, apparent that he was specifically asked whether or not James Gekonge was at the scene. Furthermore the fact that Barongo did not find James Gekonge at the scene does not render the evidence of James Gekonge that he witnessed the assault incredible.

According to the evidence of James Gekonge he has a common fence with the deceased's home. It is thus probable that he could have been in his nearby house when Barongo arrived. It is also probable that it is Barongo who was mistaken.

James Gekonge gave a detailed description of the circumstances under which the appellant stabbed the deceased. The incident occurred at about 5.00 p.m. He was cross-examined by the appellant's counsel at the trial but his evidence was not discredited. The evidence did not suggest that James Gekonge had

any motive for falsely implicating the appellant. He testified that he reported the incident to the police on the following day which fact was confirmed by the investigating officer.

The evidence of the investigating officer is clear that he arrested the appellant, charged him with an offence of assaulting the deceased but after the deceased died he withdrew the charge of assault and charged the appellant with murder.

The appellant admitted that he had reported to the investigating officer early on the morning of 9th November, 2004 (a day after the deceased was stabbed), that he had been assaulted by a person who was stealing the alternator from his vehicle. According to the investigating officer the appellant handed over an alternator, knife and iron bar saying that he took the knife and iron bar from the thief. It is true that the knife was not taken to the Government analyst. However, the appellant did not tell the investigating officer that he had stabbed the thief with the knife or that the thief had stabbed him with it. There was no evidence that the knife had blood stains. Furthermore, the knife was taken to the police station a day after the deceased was stabbed. It could have been interfered with. According to the evidence of James Gekonge the appellant was armed with a knife and an iron bar. The appellant took a knife and iron bar to the police station on the following day. It is apparent that in his report to the police he did not give the name of the thief who had assaulted him. However, in his statement in his defence he stated that he had fought with one Ratemo. He did not give further details. He did not say that Ratemo is a different person from the deceased. It is apparent that his version of the events was not consistent. At first he told the police that he was assaulted by a thief. In court he said that he fought with one Ratemo. It seems from evidence of the investigating officer, that he investigated the appellant's report and established that the person that the appellant claimed to have fought with is the deceased for he said in his evidence on cross-examination:-

“The accused was in police custody from 10th November, 2004. I issued him with the P3 form on 9th November, 2004. I accompanied the accused to hospital on 9th November, 2004. The accused reported that he had been assaulted. The accused brought to the police station the exhibits. The initial case of assault was withdrawn. I went to Nyabururu where the deceased and the accused were fighting.”

On our own analysis of the evidence we are satisfied that James Gekonge was a credible witness and that the circumstances under which the appellant reported the assault allegedly by a thief and surrendered a knife and iron bar, supports his evidence. We are satisfied that the trial Judge reached the correct decision on the basis of the evidence before him.

Accordingly the appeal is dismissed in its entirety.

Dated and delivered at Kisumu this 23rd day of June, 2011.

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.M. GITHINJI

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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.