IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OMOLO, BOSIRE & NYAMU JJ.A)

CRIMINAL APPEAL NO. 524 OF 2010

BETWEEN

PETER KIBUE WANYEKI.. APPELLANT

AND

REPUBLIC...RESPONDENT

Appeal from a judgment of the High Court of Kenya at NAIROBI (Lesiit) dated 16th September, 2010
in
H.C.CR.C. NO. 34 OF 2009

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JUDGMENT OF THE COURT

This is the first and last appeal of **PETER KIBUE WANYEKI**, the appellant, who on 16th December, 2010, was convicted by the High Court of Kenya at Nairobi, after a trial, for the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code, respectively. The appellant's conviction was based on both direct and circumstantial evidence.

In the appeal before us Mr. Ondieki for the appellant submitted before us that the conviction was in error, in his view, because evidence linking the appellant to the offence was weak, indeterminate and if anything it shows that at best the appellant was probably guilty of the lesser charge of manslaughter contrary to **section 202** as read with **section 205** of the Penal Code respectively.

The main witness at the appellant's trial was **Bernard Kahigu Gathu** (PW1), a lorry driver and resident of Ruiru. On 18th March 2009 he was at his residence at Kihunguro Village in Ruiru, when at about 9 p.m. he left to go to a bathroom behind his residence for a bath. He heard screams from behind the house. He went to find out. He saw light from a mobile phone and as he could make out it was as if it was on the ground. It was about 50 ft away. When he moved closer he found a person beating another with a twisted metal bar. The blows were aimed at the head. He identified the assailant as the appellant but he was not able to identify the victim. The appellant like the witness was a driver and the two had worked together in the matatu industry. The witness knew him as Kibue and he was nicknamed as Kamolo. They had known each other for well over 8 years.

PW1 testified that he tried to stop the appellant from further assaulting his victim, but the appellant refused and instead threatened the witness with injury. PW1 retreated and called a neighbour whose name he gave as "*Mama Shiku*" or "*Mama Ciku*". Pauline Musiko Kariuki (PW2) is the person PW1 described as "*Mama Shiku*". Her house was close by. Mama Shiku responded and herself raised an alarm. The

appellant fearing the approaching people started walking away hurriedly, but, PW1 caught hold of him and restrained him from leaving. Many people came to the scene and led the appellant back to where he had left his victim.

Initially the people who responded to the cries for help made by PW1 did not recognize the victim. Joseph Ndungu Njoroge (PW3), however, observed him closely and he was able to recognize him as **Sylvanus Thuku Macharia**, the deceased. PW3 observed that the deceased was motionless. Blood was oozing out of his right eye. He also was bleeding from the head. He saw the appellant at the scene standing about 20 metres away. He was remonstrating that the deceased was *"just a thief."* But he was not able to say what he had stolen. PW3 observed that the appellant had an iron twisted rod in one of his hands and a telephone sim card in the other. The appellant at one point said his phone had been stolen but he was unable to explain how he was able to retain the sim card if the phone had indeed been stolen.

There was a mobile phone on the ground which the crowd identified as belonging to the deceased. PW3 used it to contact the deceased's father. He was able to get the father's number by scrolling down the numbers which were saved in the phone. It is instructive that PW3 stated that the deceased lived about one kilometre away from the scene. He was said to live *"at his first parents home, about 1 kilometre to the scene of incident."* His father however, lived at a different place. The above distance is significant considering the events before the attack on the deceased on the material day.

The deceased was apparently living alone in his house. His parents were separated. His mother, **Rita Wanjiru Macharia** (PW6) was then a nominated councilor at Ruiru, while his father, **Francis Macharia Mwangi** (PW7) was a manager with Taifa Option Finance, at Thika town. PW6 and the appellant were at times cohabiting as man and mistress. PW7 was not happy with that relationship and it was part of the reasons for the separation between him and his wife. PW6 testified that the deceased was unaware of her relationship with the appellant but PW7 testified otherwise. However, both implied that the deceased was not happy with that relationship.

The deceased, had a girlfriend, **Nancy Wanjiru Wainaina** (PW4). She visited him on 18th March 2009 at about 7.30 p.m. She apparently also lived in the neighourhood. She testified that the deceased was *"my friend and also my neigbbour."* She recalled that while she was in the deeased's house he received some calls through his mobile telephone set. She also testified that after she had stayed with the deceased for a short while, a person knocked at his door. He went to answer the knock. He went outside to meet the person who knocked and stayed with him outside for about 15 minutes. Upon his return he told PW4 that he wanted to leave. As she also wanted to leave, they left together. The deceased locked his house and left. They parted company outside and went in different directions - the deceased being accompanied by the person who had knocked but whom she did not identify.

It later emerged that one of the people who called the deceased through his mobile phone while PW4 was in his house, was the appellant. The appellant's call was received at 7.56 p.m. An hour or so later PW1 saw the appellant battering the deceased with an iron bar. What the deceased and the appellant talked about during their telephone conversation is not known. The conversion, however, took a short time about 24 seconds. The appellant stated in his defence that he called the deceased at 6 p.m. and not 7.56 p.m. The appellant wanted him to avail some documents which he needed for purposes of securing a job for the deceased. The deceased allegedly said that he was far away and could not possibly make available on that day the documents the appellant needed. Mr. Ondieki for the appellant submitted before us that the time difference was negligible arguing that for ordinary people 6 p.m. and 7.56 p.m. is about the same time and that we should accept the appellant's story in that regard.

The main issue at the appellant's trial and even before us is whether or not the appellant is the person whom PW1 found battering the deceased. PW1 was categorical that the appellant and no other person fatally assaulted the deceased. The trial Judge (Lessit, J.) believed PW1 that he, the witness, saw the appellant assaulting the deceased. He tried to restrain the appellant from continuing to assault the deceased but the appellant turned against him intending to assault him instead and thus prompted PW1 to retreat. The learned Judge also believed PW1 that with the assistance of members of the public he, in effect, arrested the appellant and later handed him over to the police.

PW2 and PW3 who responded to the alarm raised by PW1 supported his testimony. They too, were believed by the trial Judge. Their testimony was to the effect that the appellant told them that the deceased *"he is a thief"* but according to the two witnesses the appellant did not give clear details of what the deceased had stolen. According to them the appellant alleged that the deceased stole his mobile phone.

There is no doubt that the deceased died from injuries he sustained on the night of 18th March 2009. We also have no basis for disbelieving PW1 that the appellant inflicted the injuries which caused the death of the deceased.

Although the appellant has raised several grounds in his memorandum of appeal, which he has erroneously titled as petition of appeal, and other grounds in a supplementary memorandum of appeal filed by his advocate, the main issue, is whether he was properly identified as the person who fatally assaulted the deceased. We have already set out the background facts. The trial Judge (Lesiit, J.) in her judgment found as fact that the appellant is the person who assaulted the deceased and that following those injuries he died. As stated earlier the learned Judge believed PW1 who testified that he witnessed the assault. She also believed PW2 and PW3 who testified in support of PW1's evidence. She however, rejected the appellant's story and also the story of his father who testified as PW7that the appellant was not at the scene.

What was the appellant's case at the trial?. In a sworn statement the appellant stated that he arrived in Nairobi on 17th March 2009. On 18th March 2009, at about 4.30 p.m. he met PW1 at Ruiru. PW1 is a person he knew before. PW1 asked him *"where have you come from you prostitute, husband of other people's wives."* His response was that it was not his business to make such an inquiry. He parted company with him. However, he later the same day saw him in the company of the deceased's father standing somewhere within Ruiru Township. He went into Safari Bar, took two beers while waiting for one James. James did not come, so he decided to check on him at his home. At 6 p.m. he called the deceased on his cell phone, because he needed copies of his academic certificates to enable him, the appellant, get a job for him. According to the appellant the deceased told him that he would not be able to avail those certificates because *" he was a bit far and that he would not meet that day."* The appellant then proceeded to his sister's home, but when he failed to meet her, he decided to go to Kahuruko bar where he took more beers. At about 8 p.m. he decided to go to the home of one Michael who was the husband of his sister's daughter. She lived about a kilometre away. On his way there he saw two people approaching him just before he crossed a railway line nearby. At the same time he could hear other people walking behind him. Before he could turn to find out who they were he was hit on the back of his head. He fell down as a result and lost consciousness. When he regained his consciousness he realized he had urinated on himself, and that there were several people surrounding him. He was immediately asked to identify himself, which he did. At their request he explained that he was going to see Michael at Kuhungure. He was shown a person who was lying down close to where he was and was asked whether he knew him. Using torch light he was able to recognize the person as the deceased in this matter. At that point he realized he had lost his mobile phone and some cash. He borrowed a mobile phone and contacted the deceased's mother to inform her that he had been assaulted while on his way to Michael's house. He also informed her that the deceased had also been assaulted. He was then taken to the police station.

It is noteworthy that the appellant denied there was any metal bar at the scene. He was categorical that "*I did not see any metal bar either at the scene or the police station. I saw it for the first time here in court."* The appellant denied he killed the deceased.

We have set out in detail the appellant's statement because of his counsel's submission that the appellant acted in self-defence when he allegedly assaulted the deceased. It was not the appellant's case at his trial that he acted in self-defence. His case, as is clear from what we have set out above, was that he was ambushed and assaulted. He did not fight with any one and that PW1 lied when he stated that he saw the appellant assaulting the deceased. The defence of an accused may only be inferred from the evidence on record . Any defence not based on evidence led before the trial court cannot properly be acted upon for the benefit of an accused whether at the trial or on appeal. For that reason the submission by Mr. Ondieki that the appellant acted in self-defence is clearly a red-herring.

Regarding the issue of identification the trial Judge's decision was based on credibility of witnesses. This Court cannot interfere with findings of fact by the trial court which were based on credibility of witnesses unless no reasonable tribunal could make such findings or it is shown that there existed errors of law. (**Republic v. Oyier** [1985]KLR 353).

The key prosecution witness was PW 1. His testimony as material to the issue of identification, was as follows:
"I tried to threaten the attacker so as to deter him from assaulting the other. When he also threatened me and started coming towards (sic) menacingly, I moved backwards calling out a neighbour."

It is noteworthy from the quotation above that the person who was assaulting the other did not want to be interrupted. He threatened PW1 with injury because PW1 himself wanted to help the victim of the assault. It is also noteworthy that both PW2 and PW3 testified that the appellant tried to justify his action of assaulting the deceased when he alleged that the deceased had stolen a mobile phone from him. His argument was that the deceased was a thief. Indeed in his defence the appellant said he lost his mobile phone on the material night. Yet evidence led by both PW2 and PW3 showed that the appellant had his sim card with him. Both witnesses did not, for that reason, believe him. Besides PW1, PW2 and PW3 testified that the appellant was using an iron bar to assault the deceased. PW2 and PW3 came to the scene in response to an alarm PW1 raised. They were, so to speak, independent witnesses. They testified that they saw the iron bar at the scene. The appellant on the other hand denied he saw the iron bar.

Neither the trial court nor ourselves are able to find a reason why PW2 and PW3 would lie against the appellant. Besides it is in evidence that the appellant called the deceased on his cell phone a few minutes before the incident. The appellant offered an explanation as to why he called the deceased. The circumstances of the case make us have difficulty in accepting that explanation. The appellant's call was made at about 7.56 p.m. on the material day. Following that call the deceased hurriedly left his house, apparently to meet someone. Coincidentally there was a knock at his door and the deceased after a short chat with that person left his girlfriend (PW4) and accompanied that person to a destination PW4 did not know. PW1 testified that he saw the deceased being assaulted, about 1 kilometre away from his (deceased's) residence. The question Mr. Monda for the state posed and which we ask is whether it was coincidental that the appellant and the deceased were together at the scene? The circumstances, taken independently, do not prove anything. However, when taken together with PW1's evidence they leave no doubt in our minds PW1 was a credible witness and that the appellant was the person who fatally assaulted the deceased. The nature of the injuries and the fact that he threatened to injure PW1 when the latter tried to stop him from further assaulting the deceased clearly showed he possessed the necessary malice aforethought for his act to constitute murder.

Having come to the foregoing conclusion, it is our view and we so hold that the appellant's defence was properly rejected by the trial Judge. It does not tie in with the events of the material date.

Regarding the issue raised by the appellant that part of the proceedings at the trial were not interpreted to him as required by **section 77(2)** of the repealed Constitution, we say this. According to the record, there is clear indication that evidence of all witnesses except medical evidence was duly interpreted to the appellant. Two doctors testified, the first one produced a post mortem report on the deceased, and the second, produced a medical report on the appellant. Even assuming that that evidence was not interpreted as alleged on behalf of the appellant, it is our view that it did not occasion any prejudice to the appellant. He was represented by counsel at his trial and counsel cross-examined the two doctors. It is also our view that the mere fact that on the day the two doctors testified, the trial Judge did not indicate on the record that there was interpretation, is not of itself, without more, evidence that there was no interpretation. The trial court had shown that interpretation was necessary and it cannot be that on the day the two doctors testified the learned trial Judge overlooked that fact and allowed proceedings to go on without interpretation.

In the foregoing circumstances we find no basis for interfering with the appellant's conviction. The sentence meted out to the appellant is a lawful sentence. In the result, we dismiss the appellant's appeal.

It is so ordered.

Dated and delivered at Nairobi this 8th day of July 2011

R.S.C.OMOLO
....
JUDGE OF APPEAL

S.E.O. BOSIRE
....
JUDGE OF APPEAL

J.G. NYAMU
....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR