



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAKURU

CORAM: OMOLO, WAKI & NYAMU, J.J.A.

CRIMINAL APPEAL NO. 75 OF 2006

BETWEEN

JAMES KIPKEMOI NGETICH.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Kericho (Musinga, J) dated
27th January, 2006
in

H.C.CR.C. NO. 62 OF 2003)

JUDGMENT OF THE COURT

In the High Court the appellant was charged with the murder of his wife *Alice Cherono Ngetich* on 21st July, 2003. The factual background according to the evidence presented by the prosecution is that the appellant and his deceased wife were living in a house on their own and that they had a long history of domestic quarrels. At 8.30 pm in the evening of the material day, three neighbours of the appellant namely, *Philip Langat PW1*, *Jane Cheruto PW2* and *Sally Chebet Mabwai, PW3* heard screams of a woman they recognized as the voice of the deceased. The deceased was heard by all the three as saying “*you are killing me, you are killing me*”, but two of them clearly heard the deceased, as having also screamed that the appellant was killing her and that she did mention the appellant’s name before the screams stopped. The deceased was found dead the following day in the matrimonial home.

When the police visited the scene of the crime they broke into the house and found a blanket, mattress and a walking stick all of which had blood stains but none of these items were produced in court. After the incident the appellant is said to have confessed having killed his wife to police constable, *PC Edward Koros, PW3* at the police station.

A postmortem was performed on the body and the cause of the deceased’s death was cardio pulmonary arrest due to severe head injury caused by heavy blows. After a full trial the appellant was convicted and sentenced to death.

What is before us is a first appeal. During the hearing the appellant was represented by *B.N. Makori*, advocate while the State was represented by *V.O. Nyakundi*, State Counsel II. In his submission, *Mr. Makori* relied on both the original memorandum of appeal and the supplementary memorandum of appeal. The grounds relied in the original memorandum are:-

1. *That I did not plead guilty to the charge and I still maintain the same.*

2. *That your lordship non (sic) of the three prosecution witnesses alleged to have seen me committing the alleged crime and that they did not know who in particular committed the offence.*
3. *That your lordships, the sitting judge erred in law and fact by relying on evidence adduced before court by PW1,2 and 3 to convict me whereas it was not proved beyond reasonable doubt that I actually committed the alleged crime. Nobody confirmed that I was present at the alleged scene when the incident took place. There was completely to prove(sic) that I committed the crime.*
4. *That your lordships, the trial judge similarly erred in law and fact by ignoring my defence which was strong enough to secure my acquittal considering the fact that the deceased informed me when I arrived at night that she had been attacked and sexually assaulted by unknown thugs where she sustained serious injuries and her efforts to scream for help did not attract any good Samaritan.*
5. *That your lordships, the trial judge as well erred in law and fact by taking seriously claims by PW1,2 and 3 that they feared coming to rescue the deceased when they heard screams because I was not a good neighbor but failed to realize that there existed personal grudges between four of us.*
6. *That the sentence imposed on me your lordships is so harsh and cruel considering that (sic) never laid my hand on the deceased.*
7. *I beg your lordships that the conviction be quashed and the sentence set aside.”*

The grounds raised in the supplementary memorandum of appeal are:-

- “1. *That the learned trial judge erred in law when he convicted and sentenced the appellant under sec.203 PC as read with sec.204 PC without observing that the evidence adduced does not support the same.*
2. *That the learned trial judge erred in law when he overlooked and over ruled the medical report by the psychiatrist that the appellant had some short comprising his mental status.*
3. *That the learned trial judge erred in law in failing to find that the conduct of the appellant exonerates him from the charge of murder rather than manslaughter could have been preferred (c.205 PC)*
4. *That the learned trial judge erred in law when he failed to find that the prosecution failed to prove the charge under sec.203 PC as read with sec.204 PC without observing that vital exhibits weren't produced in evidence during the trial.*
5. *That the prosecution evidence was crafted and the same was contrary hence unreliable to have sustained a conviction as established by the law.*
6. *That the learned trial judge erred in law when he convicted and sentenced the appellant to death yet failed to find that the prosecution did not record any statement under inquiry from the appellant as required.”*

In articulating the grounds Mr. Makori abandoned grounds 1, 2 and 6 of the original memorandum and only touched on ground 3 in the supplementary memorandum of appeal.

The appellant counsel's submissions highlighted that the evidence of PW1, PW2 and PW3 was hearsay because all the three did not witness the killing and had not before the incident reported to the police or anybody else that the couple had a history of domestic violence and only came to know of the death the following day when the police visited the appellant's house; that the recovered items were never examined to ascertain whose blood was on them; the medical evidence of the clinical officer, **Stephen Barasa PW4**, was inconclusive as to the cause of death in that the officer had remarked that the appellant had a poor sense of judgment together with poor interrelations with his next of kin which in his opinion was indicative of temporary insanity; that the death could have been caused by strangers; that the defence of the appellant that at the material time he had attended a funeral was never taken into account by the trial court and that the same was plausible and finally that the ingredients of the offence of murder were not present because PW4's evidence suggested that the appellant suffered from temporary insanity.

In his response, *Mr. Nyakundi* opposed the appeal by submitting that the appellant and the deceased were husband and wife who at the material time were living together; that PW1, PW2 and PW3 as neighbours did testify that they had heard screams coming from the appellant's house as they have always heard them before because the couple had a habit of domestic quarrels and therefore the witnesses were familiar with the deceased's voice which clearly stated that the appellant was killing the deceased and further that the distances between the appellant's neighbours were in the range of 50 yards; that the appellant's confession to PW5 was admissible because it was voluntary and not extracted from him and the confession was thereafter confirmed by the evidence of PW1, PW2 and PW3 and as regards the challenge that the ingredients of the offence of murder were not present the nature of the injuries was clearly intended to cause grievous harm and this pointed to the offence of murder and not manslaughter. Finally as regards the defence of drunkenness and insanity there was no evidence on record that the appellant was drunk or that he had a previous record of any mental illness.

As the first appellate court our duty is to reconsider, re-evaluate the evidence and draw independent conclusions, see ***OKENO V. REPUBLIC [1972] E.A. 32.***

On our part we consider that the evidence of PW1, PW2 and PW3 critical, in view of what PW1 and PW3 said they heard. Listen to what PW1 said:-

"I heard the voice of the deceased saying that the accused was killing her".

And concerning the screams PW3 also stated,

"The person who was screaming was saying that James was killing her"

We have reflected on the nature of the deceased's dying screams as captured by the appellant's two close neighbours and whether or not they are admissible in evidence and it is our view that they constitute dying declarations and are therefore admissible under ***section 33(a)*** of the Evidence Act Cap 80 because the circumstances in which the screams were made resulted in her death.

The relevant part reads as under:-

"Statements written or oral, of admissible facts made by a person who is dead----- are themselves admissible in the following cases –

(a) when the statement is made by a person as to the causes of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question and such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question."

A string of past cases of this Court fortify us in so holding (see ***NDUNGU v REPUBLIC [1985] KLR 487***). In the case of ***KIHARA v REPUBLIC [1986] KLR 473*** it was held:

"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 dying declaration, it must be satisfactorily corroborated and particular caution must be exercised as to when the attack took place, the identification of the assailants and the weapon used."

In the matter before us we find there was ample corroboration because at least two of the appellant's neighbours heard the same screams mentioning the appellant by name from their respective houses and independently.

In addition the chain of the evidence of all the three witnesses was that they all recognized the voice of the deceased. In our opinion the evidence of the violent nature of the appellant to the effect that the couple used to fight regularly did buttress the evidence of the three witnesses that on the material night

there could not have been any attacks from any other person. In addition both witnesses were familiar with the voice of the deceased. Their evidence in our view constituted circumstantial evidence which pointed to the appellant's guilt.

This Court in the case of *M'RIUNGU V REPUBLIC [1983] KLR 456* held:-

“Corroboration need not be direct evidence the accused committed the crime, it is sufficient if it is merely circumstantial evidence of his connection with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed but also that the person committed it.”

The evidence of the two neighbours in our view satisfies the definition of principle of corroboration. It is our considered view that the above evidence was believed by the trial court and on our part we have seen no reason to disagree.

In our view the confession to a police constable was not admissible by dint of **section 25A** of the Evidence Act but the independent evidence of the three witnesses was sufficient to sustain a conviction. There is no legal basis for Mr Makori's submission that the evidence of PW1, PW2 and PW3 was hearsay. The witnesses said they **heard** the deceased screaming, not that they had been told the deceased was screaming – see **section 63(2)(b)** Evidence Act.

Similarly, as regards the defences of drunkenness and insanity we are satisfied that the evidence in support did not constitute the defences contemplated in the relevant provisions of the Penal Code.

Thus **Section 12** of the Penal Code on insanity states:-

“A person is not criminally responsible for the act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission; but a person may be criminally responsible for an act or omission, although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act or omission.”

With respect, the clinical officer's opinion concerning the appellant's alleged poor judgment does not fall within the definition of insanity and consequently we place no weight on it. Similarly as regards the defence of drunkenness there was no evidence of drunkenness and in any event there was no proof that the drunkenness did amount to the defence of intoxication as contemplated by **section 13(2)(b)** of the Penal Code. **Section 13(2) (b)** states:-

“The person charged was by reason of intoxication insane, temporarily or otherwise at the time of such act or omission.”

In the result the appeal must fail and the same is dismissed.

DATED and DELIVERED at NAKURU this 11th day of SEPTEMBER, 2011.

R.S.C. OMOLO

.....
JUDGE OF APPEAL

P.N. WAKI

.....
JUDGE OF APPEAL

J.G. NYAMU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR