



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: O’KUBASU, GITHINJI & NYAMU, J.J.A.)

CRIMINAL APPEAL NO. 457 OF 2007

BETWEEN

ABDULLAHI OSMAN MOHAMED.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Ombija, J.) dated 20th August, 2007
in

H.C.CR.C. No. 37 of 2004)

JUDGMENT OF THE COURT

In the High Court, the appellant was charged with the murder of the deceased, **Shire Goni Dahir**, on 26th June, 2003 at *Sundu Telephone Bureau* in Mandera District within Eastern Province.

The prosecution’s case was that the shooting and the release of a hand grenade thrown at the deceased were the two incidents which led to the death of the deceased. The eye witnesses testified that they saw the deceased coming from an office with the appellant hot in his heels, in an attempt to block the deceased from taking shelter in a local telephone bureau. At some point in the case the deceased tried to raise his hands as a sign of surrender, but all the same the appellant shot at him below the armpit. When the appellant tried to cock the pistol again, the pistol could not fire, whereupon he removed a hand grenade and at the same time removed a pin from the grenade, causing an explosion which fatally injured the doctor, who went down crawling. Several people were injured as a result of the explosion. One of the victims of the explosion **Mr. Abdi Mumin Abdile (PW13)** testified and confirmed the case as outlined above. The deceased was pronounced dead at Mandera District Hospital. The cause of the deceased’s death according to a medical report was acute internal hemorrhage due to bullet wounds to the chest. The appellant’s defence was that he was arrested along Kenya-Somali border by Somali militia in “*no man’s land*” and he assumed that he was arrested because of inter-clan fighting in Somalia.

What is before us is a first appeal. During the hearing the appellant was represented by *Mr. Ratemo Oira Advocate* while the State was represented by *Mr. Monda*, Principal State Counsel. *Mr Oira* relied on the six grounds set out in the memorandum of appeal filed on 11th March, 2011 as follows:

1. **That** the learned High Court Judge erred in both law and facts (sic) when basing (sic) conviction on the purported identification by pw4, PW5, PW6 and PW7, whereas their identification evidence was not sufficiently trustworthy to have been acted upon in that:-

- (a) PW4 claims to have never identified me at parade identification.(sic)
- (b) PW5 never attended identification parade nor pointed at me during testifying (sic) at the court.
- (c) PW6 his (sic) identification was null as he managed to identify me by a big scar which he did not show the same at court. In addition PW6 during parade he identified himself As **Siyad Abdirahaman Adan** where (sic) at the court he claimed (sic) himself as **Saed Abdi Rahaman**
- (d) PW7 claimed that he was called by the police barely after one month to come and identify the appellant. Which is contrary to chapter 46 forces orders, letter (sic) 6(iv) (k) a witness should not be impounded (sic) in anyway, also it contravened chapter 6(iv) (c) that a witness should not see the accused prior the parade.
2. **That** the learned high court judge erred in law by failing to observe (sic) that the prosecution's case fell too short of the standard required by the law in failing to summon essential witness (sic) namely the **Somali militia officers** which they claimed that they assisted pw10 to arrest the suspect in 'no man's land' on the Somali border.
3. **That** the high court judge erred in law and facts (sic) when failing to observe (sic) that no inventory list nor documentary evidence of the booking of the alleged **14 rounds of ammunitions** (sic) and the empty magazine exhibits mf1-3 and mfi-4 was produced as prove to the same.
4. **That** the learned high court judge erred in law and facts (sic) by failing to observe (sic) that the alleged Somali elders claimed by pw3 to have brought a **Tokarev pistol (mfi-5)** were not summoned by court to clarify the truth of the matter.
5. **That** the learned high court judge erred in both law and facts (sic) by upholding the evidence against the appellant was overwhelming whereas failing to observe that the crucial evidence adduced was riddled by contradiction and discrepancies in respect of alleged recovery of ammunition and magazine (mfi-384).
6. **That** the learned high court judge erred in both law and facts by upholding the case for the prosecution as proved beyond the reasonable doubt whereas the burden of proof was not discharged as the law demands in that:-
- I. The **Tokarev pistol (exhibits A)** alleged to have been used to commit the offence charged according to pw13 was not the pistol that fired **exhibits c1-c3** and therefore, malice aforethought was not proved as per the provisions of section 206 of pc.
- II. No proof was established to the effect that there was an intention to cause death.
- III. No internal **postmortem** performed on the deceased hence no prove as to actual cause for the deceased death."

In his submissions, Mr. Oira indicated that he was in the main relying on three grounds, namely that the identification parades conducted on 18th July, 2007 and 20th July, 2003 in which the appellant was allegedly identified were not conducted in accordance with the Force Standing Orders, that PW7 had seen the appellant before the parade and therefore the identification of the appellant by PW4, PW5 and PW6 was not safe; that the cause of death had not been established and consequently the ingredients of the offence of murder were not in existence and finally that the cardinal principles of criminal law were not adhered to in that the arrest of the appellant was in "no man's land" near the Kenya-Somali border, and essential witnesses including the Somali Militia officers, were not called to testify, and all in all, the prosecution did not in the circumstances discharge the burden of proof.

Mr. Monda in opposing the appeal submitted that the prosecution's case was watertight in that the appellant was arrested immediately after the commission of the offence and there was direct evidence

from several eye witnesses. That the chasers of the appellant never lost sight of him up to the point of his arrest and therefore the issue of identification did not arise since several witnesses did place the appellant at the scene of crime, that in any event the offence was committed in broad daylight at 9.30 a.m. and therefore the conditions surrounding the identification were safe; that it is clear from the contents of the parade notes, that the identification parades were properly conducted and that there was no proof of any breach of the Force Standing Orders and finally all the assessors had returned a unanimous verdict that the appellant was guilty of murder as charged and in this regard the ingredient of malice aforethought was present as reflected in the medical reports on the cause of death and the nature of the injuries suffered.

Before embarking on our task we must remind ourselves that as the first appellate court our duty is to reconsider, re-evaluate the evidence and reach our own independent conclusion, see **OKENO V REPUBLIC [1972] E.A. 32.**

A good starting point in undertaking our task is to consider the evidence of ***Isaak Hassan Abey PW7*** as regards identification of the appellant. ***Mr. Oira's*** contention is that he had already seen the appellant before he was invited to attend at an identification parade. On the point we agree with ***Mr. Oira. PW7*** testified:-

“As I was passing I saw a doctor by the name Jane. I greeted him and he replied. He was turning into MSF office. He was walking fast. A few metres away I heard a gun shots (sic) behind me. I looked back and saw a person with a gun who was coming at telephone bureau. If I see the man who was aiming at the bureau. I can identify him (pointing at accused in the dock) ...”

The witness concluded his testimony thus:-

“The gunman was already running towards Somali border. Later on I was called by the police to identify a person they had arrested. The man was the same one I had seen shouting at the doctor. About a month later I identified the accused at an identification parade.”

In contrast to the lapse of ***PW7's*** evidence on identification listen to ***PW6's*** evidence on the same point:-

“I saw the young man shoot at the doctor. I saw the pistol the assailant had. The doctor ran inside a bureau. I shoot (sic) at the doctor. I saw the pistol the assailant had. The doctor ran inside a bureau. I then saw a young man trying to block the doctor. I then saw the young man try to cock the pistol again but it could not fire. The next time I saw the assailant try to remove a safety pin from a grenade. I heard the explosion. ...”

If I see the assailant against (sic) I can identify him (points at the accused at the dock) ...

I identified the accused person on identification parade at Garissa.”

Still on the issue of identification ***Mr. Farah Omar Matan PW4*** testified:

“I was in the office about 9.30 a.m. sending calls to 6 people. I saw a European run inside the bureau and hot on his heels was the accused who had a pistol.

The assailant shot once at European but bullet missed him. In a few seconds I heard an explosion and felt sand and small particles thrown on any (sic) body. The accused was wearing blue shirt and black trouser. I looked at the face of the accused well. I confirmed (sic) that the person who shot at the European is the man (pointing at the accused in the dock)”

According to ***Ag. IP. Charles Kibei (PW)*** who conducted the identification parade held on 19th and 20th July, 2003 two witnesses were able to identify the appellant and they included ***PW4.***

Mr. Murish Mohammed Ellmi, PW5's evidence on the point was:

“The assailant came through the other door and pulled the pin of the hand grenade (sic). The person who was chasing the white man is in court. ...”

Mr. Abdi Mumia Abdile, PW13 an eye witness and victim of the incident stated:

“I looked towards the direction of the shot and noticed a white man running towards the bureau. I then saw somebody throw a hand grenade (sic) at the white man who was now inside the bureau. The grenade exploded ...”

Before I was injured I saw the deceased person bleeding profusely. He died moments later. A doctor filled the P3 form in respect of the injuries the form was taken to the investigating officer.”

Concerning the circumstances of the appellant’s arrest and the items recovered ***Sergeant Rashid Ibrahim Ali, PW9*** testified:

“I saw the person running towards the border on a red T-shirt (sic) who fitted the description of the members of the public gave me.”

.....

We managed to arrest the accused at no man’s land.

We apprehended him and took him to the border. We recovered 42 (sic) rounds of ammunition in his pockets (trouser and empty magazine.

.....

Later I negotiated with the elders from (sic) the Somali side where they brought a Tokarev (sic) pistol without a magazine. ...It was the one he was firing at the policeman at border

Sgt. Rashid who accompanied me did the search on the accused in my presence and recovered the ammunition and the magazine. The pistol was thrown across the border off (sic) the accused and we had to negotiate with Somali side to retrieve the pistol for evidential purposes.

Regarding the chase of the appellant Sgt. Rashid Ibrahim Ali testified

“I remember 26th June, 2003

I received information from controller through pocket phone that somebody had killed another and was escaping towards Somalia. I sent officers to the border to report to the merchant (sic) ran towards the exit gate of the border. In a few minutes I saw a person running towards Somali firing at other security men. I ran towards no man’s land. With the help of the militia guarding the boarder (sic) and reinforcement from the police and the commander of the O.C.S. we made a quick search at the station and found 14 rounds of ammunition, a magazine (on the right pocket of the trouser).”

PC. Edwin Kimaio PW10 testimony covering the events of 26th June, 2003 was:

“I am stationed at Mandera Border Police Post. I remember 26th June, 2003 at 9.30 a.m. I was (sic) normal duties. All over a sudden there was a crowd moving towards Somali. I stood up and focused my eyes towards that direction. I saw the crowd chasing a person who was armed with a pistol

We arrested the gun man in “no man’s land” and took him to the police station.”

Taking into account the arguments presented to us by both parties on the issue of identification in the face of the evidence outlined above, we are of the view that notwithstanding the unsafe identification by PW7 for having seen the appellant prior to the identification parade as conceded above, the other witnesses as set out above did identify him at the scene of crime and all of them did place him at the scene of

crime. Indeed, he was not only identified, but he was found in possession of ammunition that was used to perpetrate the crime in addition to eye witnesses linking him to the hand grenade which caused havoc to the occupants of the telephone booth. In this regard the evidence of PW12 and PW13 who were both victims of the explosion clearly placed the appellant at the scene of crime.

Similarly the chain of evidence as reproduced above demonstrates that immediately after the explosion the appellant was closely followed by members of the public and after the appellant's description or identity was relayed to the police, the police swiftly traced his steps to the Kenya-Somali boarder and with the assistance of the Somali militia the police were able to arrest the appellant in order to bring him to the seat of justice. In this regard, the investigating officer's evidence concerning the recovered items was sufficiently corroborated by the evidence of **Sgt. Rashid Ibrahim Ali PW9** and **Pc. Edwin Kimaio PW10**. Also relevant to the issue of identification is that, the ballistic expert did form the opinion that the spent cartridges exhibits CI – C3 gathered from the scene of the crime were all fired from Exhibit A, a Tokarev pistol which was found in the appellant's possession. Moreover several eye witnesses did give similar descriptions of the appellant's attire which also placed him at the scene. From the foregoing the appellant's grounds based on identification in our view, are for the above reasons shaky and unsustainable.

Turning to the challenge that the cause of death was not properly established and that the ingredients of the offence of murder were not present, after evaluating the medical evidence as reflected in the postmortem report it is clear to us that the cause of death was accurately indicated in the report as under:

“Severe acute internal hemorrhage secondary to bullet wounds to the chest.”

Dr. Kennedy Amohaya Wanyonyi PW2 who performed the post-mortem testified:

“There were lacerations all over the body and two apparent bullet wounds on the chest (right side of the sternum).

And further stated:-

I made the opinion that the death was caused by severe acute internal hemorrhage secondary to penetrating wounds on the chest i.e. sudden severe bleeding. The impression I had was that it was bullet wounds.”

The above pieces of evidence demonstrate that the deceased suffered grievous bodily harm, proof of which, is one of the ingredients of malice aforethought as defined in section 206 of the Penal Code. Indeed, an evaluation of the evidence as above, inevitably lead to the conclusion that the appellant had an intention of killing the deceased using all means possible in that after using the pistol to shoot the deceased, when he did not achieve what he wanted to achieve with if he threw a hand grenade in order to accomplish his evil mission. This ground is therefore destined to fail. Finally regarding the “submission that cardinal principles of criminal law” were not followed in the conduct of the trial we have been unable to confirm any violation as alleged. All the witnesses involved in the chase and arrest of the appellant gave direct evidence of what they saw and therefore it was not necessary to call the “Somali Militia” as witnesses or any other witnesses to buttress the prosecution case since, as held by the High Court, the evidence presented was watertight. In the circumstances, the chase of the appellant to “no man's land” and his arrest was effected due to collaboration between the Kenya Police and effective the Somali Militia a unique mutuality which cannot be faulted in law.

All in all, we find no merit in this appeal and the same is hereby dismissed.

Dated and delivered at Nairobi this 9th day of December, 2011.

E. O. O’KUBASU

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JUDGE OF APPEAL

E. M. GITHINJI

.....
JUDGE OF APPEAL

J. G. NYAMU

.....
JUDGE OF APPEAL

I certify that this a true copy of the original

DEPUTY REGISTRAR