



COURT OF APPEAL OF KENYA

AT NAIROBI

CRIMINAL APPEAL NO. 95 OF 2006

JUSTUS SILA KYULI APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Machakos (Nambuye, J) dated 23rd September, 2002

in

H. C. CR. C. NO. 29 OF 2000)

JUDGMENT OF THE COURT

The appellant was charged in the superior court with the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code. The particulars of the charge stated that the appellant on 25th March, 2000 at Kanyongo Village Kithyoko Machakos District murdered Musyoka Nzwii (deceased). He pleaded not guilty but after trial with the aid of assessors he was convicted and sentenced to death. This is his first and final appeal.

The deceased was the son of Wilson Nzwii Choa (Wilson) and his first wife Rhoda Choa (Rhoda) and was aged about 29 years at the time of death. He was living in a portion of his father's land with his wife. Wilson and Rhoda had other children including Andrew Mutungi Nzui (PW 8) who is apparently the husband of Serah Mbila Mutunga (Sarah) (PW 2). Wilson's second wife, Esther lives in a separate part of Wilson's land with her children including Stephen Musila Nzui (PW 3) and Gideon Thiangi, the latter being the husband of Anastacia Mutethia Kisingu (Anastacia) (PW 7).

The appellant's father, Kyuli who is the younger brother of Wilson lives on his own adjoining land with his wife Tabitha Kyuli and other children. The appellant is thus a cousin to the deceased.

On the morning of 25th March, 2000, the deceased; Serah and two others went to plough the land of Wilson. They worked in the shamba until 2.00 pm when they went to the home of Wilson's second wife Esther for lunch. The lunch which was served by Anastacia lasted for about one hour after which Anastacia and the deceased escorted Esther. When the three reached at a road junction, where one road leads to Serah's home; the other to appellants home, and the third to the market via the hills, they stopped

and started chatting. The road to appellant's home also leads to Anastacia's home. As the three were talking the appellant appeared and stood quietly about a metre from where the three were standing. The appellant appeared annoyed and Serah asked him why he was annoyed. The appellant said that he was not annoyed and told the deceased that he had been looking for him since morning and that he wanted to talk to him. The deceased agreed and the two walked away side by side towards the hill. Meanwhile Anastacia and Esther separated, each walking towards her respective home. This was at about 5.00 pm. Shortly after Serah arrived at her home which was about 30 – 40 metres from the junction, she heard somebody scream "you man why have you stabbed me with a knife". She recognized the voice as that of the deceased and ran towards the road junction using a shorter route while followed by deceased's wife. On reaching the scene she found the deceased lying down about 30 metres from the junction bleeding. She was the first person to reach the scene. She screamed and many other people ran to the scene. Meanwhile Anastacia heard screams before she reached her home and went back towards the junction. She met the appellant walking straight holding a knife which was in its sheath in his right hand. The knife looked red at the tip. He asked him what was happening and the appellant replied "go and pick your man I have killed him". The appellant went to his house which was near the road while Anastacia ran to the scene where she found Serah and the deceased's wife. The deceased was lying down beside the road. Thereafter she went to the house of accused but accused came out of his home carrying a bag on his shoulders, passed between the granary and his house and ran away.

The incident was reported to John Muna Mulu (PW 4) (John), a youth winger and leader in the area who arrived at the scene at about 7.00 pm. He, with the help of torch light, saw the deceased lying down with a stab wound on the left side of the chest. The Assistant Chief had already arrived at the scene. John went to Matuu Police Station and reported the incident. The OCS Matuu Police Station, C. I. Soita Wanjala (PW 11) was among the police officers who went to the scene. He found the deceased lying dead at the scene with a stab wound on the left side of the chest. He arrested the appellant who was hiding in the kitchen of his mother's house. The appellant was questioned and he admitted that he is the one who had stabbed the deceased. He was asked where the knife he used was and he said it was in the shamba. The mother of the appellant then called John aside and led him to the granary and removed the knife from the top of the door and gave it to John. John in turn gave the knife which was blood stained to C. I. Soita Wanjala. The knife was produced as an exhibit at the trial. Dr. Simon Kioko Muli (PW 10) who performed the post mortem on the body of the deceased found that the deceased had sustained a penetrating left chest stab wound measuring 6 cm x 3 cm leading to the collapse of both the heart and lungs, and formed the opinion that the cause of death was cardiopulmonary arrest due to penetrating left chest wound leading to haemopneumothorax (accumulation of air and blood in the pleural cavity).

The appellant gave sworn evidence at the trial, in essence that on the material day at 6 p.m. while at his home he saw the deceased, Serah and Anastacia at the road passing; that the deceased told him to get out so that they could go for a walk; that he entered into his house, dressed up and followed the deceased whom he found at the junction in the company of Anastacia and Serah talking; that the deceased was still holding the panga he had used for cultivating; that deceased was drunk; that he talked to them after which Serah and Anastacia left; that he and the deceased took the route towards the market; that he had no grudge with the deceased and that they were talking as they walked. He continued:

“when we arrived at a place where there was a gully Musyoka missed steps. He fell on the same and the panga stabbed him. I took him from the fence and kept him aside. When I looked at him I saw that he was injured. I ran back to home in order to tell other people in order to take him to hospital.....”

The superior court (Nambuye, J) believed the prosecution case; disbelieved the defence case, convicted the appellant and sentenced him to death.

There are several grounds of appeal the main ones being that the charge was not proved beyond reasonable doubt; that the superior court erred in law in failing to re-evaluate the evidence and draw its own conclusions; that the circumstantial evidence did not meet the legal standards; that superior court erred in law in convicting the appellant on the basis of suspicion without cogent evidence; that the superior court erred in law in failing to resolve material contradictions in favour of the appellant and that

the superior court erred in law in failing to consider the plausible defence given by the appellant. All those grounds of appeal can be summarized into one ground namely, that, the conviction of the appellant was against the weight of the evidence. Mr. Ondieki, learned counsel for the appellant submitted, among other things, that, the prosecution did not establish *mens rea*; that there was no conclusive evidence that the words that Serah heard referred to the appellant; that the evidence of the prosecution amounted to suspicion; that the superior court misdirected itself by finding that the appellant fled from the scene and that the evidence of the appellant that deceased sustained the fatal injury through an accidental fall was plausible.

Mr. Kaigai, learned Principal State Counsel on his part submitted, among other things, that the prosecution proved beyond reasonable doubt that it is the appellant who killed the deceased; that by his admission the appellant was the last person seen with the deceased; that the defence that the deceased fell on his panga is displaced by the post mortem report and the evidence of PW 7 that she saw the appellant holding a knife. However it is Mr. Kaigai's submission that the offence proved was manslaughter and not murder.

In this case the prosecution proved beyond any reasonable doubt, and, the appellant admitted, that the deceased sustained a fatal wound on the chest on the material day while he was in the company of the appellant and died instantly as a result of the injury. Indeed Dr. Simon Kioko Muli who performed the postmortem to the body of the deceased found a penetrating left chest stab wound measuring 6 cm x 3 cm which in his opinion was caused by a sharp object like a dagger. The trial Judge correctly appreciated that there were two versions of how the deceased sustained the fatal injuries – the version presented by the prosecution and the version advanced by the appellant. The trial Judge then proceeded:

“I have weighed the two versions and I find that the version of the prosecution holds water for the following reasons:

(1) It is the evidence of PW2 and 7 that the deceased was ploughing his father's land from 8.00 a.m. up to the time they stopped at 3.00 p.m. had lunch and then he left with PW2 being escorted by PW7. It is their evidence that the deceased herein never left the field he was ploughing to go to drink, nobody visited them in the field to serve them with drinks. When they went to have a meal PW 7 is the one who was serving them and she said she did not serve them with beer. PW 1 and 3 a father and brother said the deceased never used to drink while PW2 and 7 said that they have never seen him drunk but do not know if he drinks. They however, maintain that he was not drunk on this day. The court believes this testimony as they are the ones who spent the day with him.

(2) Their evidence that the accused met them at the junction and invited the deceased for a chat or discussion over some issue was confirmed by the accused himself although he varied it by saying that it is the deceased who invited him for a chat as they strolled towards the market.

(3) PW2 heard the deceased shout and say why have you stabbed me and on rushing there she found the deceased lying on the ground with a stab wound on the chest. PW2 had lived with the deceased for long and she was familiar with his voice and what she heard was true because when she moved to the scene she found the deceased lying dead with a stab wound in the chest.

(4) The medical evidence ousts the accused's testimony that the deceased fell on a thorny fence. If this had been the case the deceased would have been pierced by thorns and those wounds would have been found on the body of the deceased. There were no such marks on the deceased's body as shown by the doctor's evidence PW10 and the post mortem report exhibit 2.

(5) The cause of injury as put by the accused has also been ousted by the medical evidence and that of PW7 because the doctor said that the injury was caused by a sharp object like a dagger. A dagger is a double edged knife which is similar to exhibit 1 which was produced in evidence. A panga was ruled out by PW10. If it is true that the deceased was injured by his own panga then the same could have been found at the scene. None was found at the scene. PW7 met accused holding a knife in his right hand with reddish colour at the tip and he retorted to her that he had killed her

man and she should go and carry him. This same knife was recovered from the accused's home with blood stained tip and it was still blood stained at the time of trial though rusted.

(6) The conduct of the accused also negatives his innocence. If he had not inflicted the injury why did he run away from the scene? A sensible action of an innocent person in the circumstances of the case would have been to remain at the scene and then shout for help. Accused ran away from the scene and never came back. He says he went to seek help from other people but there is no evidence to show that he sought help from anybody not even PW7 when he met her on the way as he went away from the scene.

(7) PW2 and 7 said that the deceased was not armed with anything neither did they see accused armed with a knife. However, from its size as it was viewed in court, it is the size of an object which could have been hidden anywhere on the body of the accused. No inspection was carried out on him by PW7 and 2 and so its possession cannot be ruled out.”

The trial judge made further findings that the charge was not fabricated as the witnesses were closely related and there was no bad blood between the family of deceased and family of the appellant; that discrepancies in the evidence regarding the recovery of the knife was minor and immaterial as the knife was recovered from the home of the appellant; that although the prosecution did not prove motive by concrete evidence there was no provocation and the injury was premeditated and intentional.

We appreciate that we are not bound by the findings of fact made by the superior court and that we have a duty to re-appraise the evidence and make our own independent findings. Indeed we should not follow the trial judge's findings, if, among other things, it appears that the findings were based on no evidence or on misapprehension of the evidence.

The conviction of the appellant was solely based on circumstantial evidence. The law is well settled that before the court can base a conviction on such evidence, the evidence must satisfy very high standards which are well known.

The material circumstantial evidence which was considered and accepted by the trial judge included the evidence that, the appellant was the only person who was in the company of the deceased when the deceased sustained the fatal injuries; that before the deceased sustained the fatal injuries the appellant appeared angry and had called him for a talk; that shortly after Esther and Anastacia left the deceased in the company of the appellant, Esther heard and recognized the voice of the deceased shouting “*you man why have you stabbed me with a knife*”; that Anastacia met the appellant holding a blood stained knife walking away from the scene as she ran to the scene to answer the screams; that the appellant absconded from the scene and from his house and that the blood stained knife was recovered from the appellant's home.

The appellant's defence that the deceased was injured by the panga he was carrying when he accidentally fell down and that the deceased was drunk was considered and rejected by the superior court for good reason in our view. Indeed Dr. Simon Kioko Muli said that the fatal injury that the deceased sustained could not have been caused by an ordinary fall on a panga. He said in part in his evidence in cross-examination:

“Unless the deceased was epileptic you cannot fall and then suffer in such a wound which is very sharp and very deep.”

The evidence of the doctor discredits the defence of the appellant and lends credence to the evidence of Esther that she heard the deceased scream that he had been stabbed with a knife and the evidence of Anastacia that she met the appellant walking from the scene holding a blood stained knife which evidence the superior court believed. The superior court found the prosecution case to be credible. We cannot interfere with the findings of fact by the superior court which were based on the credibility of witnesses unless it is shown, which the appellant has failed to do, that no reasonable tribunal could have made such findings or that there were errors of law.

On our evaluation of the evidence, we are satisfied that the superior court considered the evidence with circumspection and that the conviction of the appellant was based on credible, strong and overwhelming circumstantial evidence.

Although the evidence did not clearly establish the motive for the appellant stabbing the deceased to death, we do not with respect agree with Mr. Kaigai that the evidence proved the offence of manslaughter. By stabbing the deceased on the chest with a sharp knife and without any provocation the appellant intended to cause either the death or grievous harm to the deceased and by **section 206 (a)** of the Penal Code malice aforethought is deemed to have been established in such circumstances. The trial judge directed herself properly that the assault was premeditated and intentional.

In the final analysis we are satisfied that the appellant was properly convicted and that the sentence was lawful.

Accordingly the appeal is dismissed in its entirety.

Dated and delivered at Nairobi this 26th day of February, 2010.

S. E. O. BOSIRE

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

P. N. WAKI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR