



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: TUNOI, O’KUBASU & NYAMU, JJA)

CRIMINAL APPEAL NO 454 OF 2007

BETWEEN

PETER KARANJA MUTURI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

**(Appeal from a conviction and sentence of the High Court of Kenya at Nairobi (Ombija, J)
dated 20th August, 2007**

in

H.C.CR.C. NO. 28 of 2003)

JUDGMENT OF THE COURT

The appellant herein, **PETER KARANJA MUTURI**, was arraigned before the superior court on an information in which he was charged with the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code. The particulars of the offence were as follows:

“PETER KARANJA MUTURI alias KANGI: on the 19th day of November 2001 at about 8.00p.m. at Kariobangi North within Nairobi area murdered CHRISTOM OWINO MALUA”

The appellant denied the charge and his trial commenced on 10th February, 2004 before Ombija J, who conducted the trial with the aid of three assessors (as the law then provided). This being a first appeal it is our duty to re-evaluate the evidence and make our own findings but as we do so we must remember that we have neither seen nor heard the witnesses – see **OKENO V R [1972] EA. 32.**

What was the evidence adduced before the superior court? The prosecution called a total of eleven witnesses. Samuel Onyango Ikewe (PW1) testified that on 19th November, 2001 at about 7.30p.m he was at a bus stage called Hillstone when a group of people brought what PW1 called “ errant passenger” who had to be disciplined. These people who included the appellant joined in the beating of the errant passenger. PW1 stated that he knew the appellant as Kangi and that there was sufficient light at the

scene.

Maurice Okumu Osur (PW2), a hawker, testified that on the material day at about 7.00pm he was at the Hillstone bus stage and that he saw the appellant knife the deceased. In his evidence in chief Osur stated inter alia:-

“The accused knifed the deceased in the stomach. The deceased shouted that he had been knifed. We went after the accused who took off on foot. We did not arrest the accused. Accused was arrested later on by the police.”

Titus Maruka Magolo (PW3) was the father of the deceased and his evidence was that on 19th November 2010 at about 7.15p.m he received a telephone call to the effect that his son had been stabbed and that he (deceased) had been taken to Jamii dispensary. As a result of this report Magolo (PW3) proceeded to Jamii dispensary but on reaching the dispensary he found that the deceased had already died. He saw the body and confirmed that it was the body of the deceased, his son. The body was then taken to the City Mortuary for postmortem examination which was conducted by Dr. Jane Wasike Simiyu (PW11) on 21st November 2010. It would appear that there had been an earlier postmortem examination conducted by Dr. Mandu who formed the opinion that the cause of the deceased's death was “ stab wound chest, injury to the liver, hemothorax due to sharp object”

PC Anderson Saya (PW4) was the police officer who went to the scene of the incident where the appellant was pointed out as the one who had stabbed the deceased. PC Saya (PW4) arrested the appellant and took him to Ruaraka Police Post. The appellant was subsequently charged with the offence of murder.

Amos Odhiambo Jaramba (PW5) was one of those who identified the body of the deceased at the City Mortuary for postmortem examination.

Pc Adem Mwawasa (PW6) was on patrol duties on 19th November, 2010 at 8.15 p.m. at Hillstone stage when he saw a group of people chasing two people. Pc Mwawasa (PW6) stopped their patrol vehicle and joined in the chase of the two people. The two people were arrested and put in the police vehicle which took them to Ruaraka Police Post. The appellant was one of the two people being chased by the group.

The evidence of Pc Barikalulu Luli (PW7) was that he escorted the appellant to Nairobi Area Police Doctor – Dr. Kamau (PW10) for examination. In his evidence in chief Dr. Kamau (PW10) stated, inter alia:-

“ I was requested to assess the age, examine any injuries and assess his mental status. He gave history of assault by friends of the deceased. My findings were as follows:

- 1. Healed bruises on the left loins on the right lumbia back and both hands. The hands were also swollen.**
- 2. He had a scar on the right knee and below the left one.**
- 3. This was the 8th day after the alleged assault. The injuries may have been caused by a blunt object. He has not received any medication or treatment. I assessed the degree of injury as harm and his age at 19. He was, in my opinion, of sound mind.”**

Pc Paul Mulami Mbunzi (PW8) testified that on the material day and time he was in the company of Pc Mwawasa (PW6) when they arrested the appellant.

Inspector Isaya Mutisya (PW9) testified that on the material evening he received a report that somebody had been stabbed. As a result of the report Pc Mbunzi (PW8) proceeded to Jamii clinic where he found the body of the deceased which he transferred to the City Mortuary for postmortem examination.

When put to his defence the appellant made unsworn statement to the effect that on the material day and time a fight broke out between his brother and the deceased and that it was the deceased who was the aggressor and that he (appellant) merely acted in self defence.

In his own words the appellant defended himself thus:-

“ A fight broke between deceased and my brother. It is the deceased who hit my brother first. The 7 boys then started beating me, my brother and a friend by the name OTI. I was injured. I started running towards Gregon road with the 7 boys in hot pursuit. I entered a kiosk – a vegetable kiosk. I took a knife from the kiosk to protect myself. I threw a punch while the knife was in my left hand. By bad luck the knife caught the deceased. I did not have the intention to kill the deceased. I was acting in self-defence.”

At the close of the trial the learned Judge summed up the evidence and the law to the remaining two assessors who were of unanimous opinion that the appellant was guilty of murder.

In a reserved judgment delivered on 20th August, 2007 the learned Judge convicted the appellant and sentenced him to death. In concluding his judgment the learned Judge said:-

“In my judgment the evidence adduced by the prosecution witness do not support his theory of self defence. Eye witness account of the events of that day do not support his case. PW1 and PW2’s evidence is to the effect that the deceased was being disciplined in a stall by matatu conductors for failing to pay fare. The accused went ahead and took a knife 5”-6” long which he used in stabbing the deceased. The action of the accused constitutes malice aforethought as defined in section 206 of the Penal Code. In the result I find that the prosecution has proved that the accused stabbed the deceased with a long knife with the intention of causing death or grievous harm. Accused had knowledge or must be deemed to have had knowledge that his acts would cause death or grievous harm but was indifferent whether death or grievous bodily harm is caused or not.

The assessors returned a verdict of guilty and I am completely in agreement with them.

Being aggrieved by the foregoing conviction and sentence the appellant now comes to this Court by way of first appeal. It is for that reason that we set out the summary of the evidence adduced in the superior court.

When the appeal came up for hearing Mrs. M. P. O. Chesang appeared for the appellant while Mr. J. Kaigai (Principal State Counsel) appeared for the State. In her submission Mrs. Chesang stated that there was inconsistency as to the age of the deceased in that PW1 talked of an old man while the doctor who conducted postmortem examination testified that the deceased was 20 years old. It was Mrs. Chesang’s submission that the identity of the deceased was in question.

Mrs. Chesang further submitted that the identity of the appellant was also in question.

Finally, Mrs. Chesang submitted that there was no malice aforethought proved to sustain the conviction on a murder charge.

On his part Mr. Kaigai supported the appellant’s conviction but on a lesser offence of manslaughter. He submitted that there was a fight in which the appellant was involved.

We have considered the record of the trial court and the submissions by Mrs. Chesang for the appellant and Mr. Kaigai for the State and have the following to say. As regards the facts there can be no doubt that the deceased met his death on the evening of 19th November, 2001 as a result of a stab wound in the chest. This injury, according to postmortem report, was caused by a sharp object. There was the evidence of Samuel Onyango Ikewe (PW1) and Maurice Okumu Osur (PW 2) to the effect that they witnessed the incident. In his evidence in chief Ikewe (PW1) stated *inter alia*:

“I knew all the people involved in the beating. There was light. The accused in the case joined the beating. I knew this accused person before. He was called Kangi.”

In his evidence Osur (PW 2) supported the evidence of Ikewe (PW 1) that it was the appellant who stabbed the deceased. These two witnesses knew the appellant and the scene was not dark as these witnesses could easily recognize the appellant. Added to that is the unsworn statement by the appellant. In that statement the appellant did not deny having been involved in same incident that evening. Indeed he admitted that he was involved in the fight and that it was by bad luck that he stabbed the deceased.

Having considered the evidence adduced we are satisfied that there can be no doubt that the appellant stabbed the deceased and that as a result the deceased died. The defence of the appellant was that there was a fight and as the appellant’s brother was hit, the appellant reacted in self defence. The learned Judge considered the appellant’s defence but rejected it by stating as follows:

“Against that backdrop of evidence it is common ground that the accused is not denying participating in the events that led to the death of the deceased. His only defence is that he was acting in self defence against a group of seven boys who were assaulting him and his brother.

In my judgment the evidence adduced by the prosecution witness do not support his theory of self defence.”

It is, however, our view that the evidence of the two prosecution witness (PW1 and PW2) who were at the scene tend to support the appellant’s defence. For example, Ikewe (PW1) testified that he and others told those people who were disciplining the errant passenger to stop beating the man. That evidence is supported by that of Osur (PW2). From the foregoing it emerges that there was a fight in which the appellant was involved and although there were many people who descended upon the deceased (for whatever reason) it was the appellant who inflicted the fatal injury that led to the deceased’s death. The issue now is whether this was murder or manslaughter. In view of the appellant’s defence we are prepared to give him the benefit of doubt and find that in the circumstances of this case malice aforethought was not proved. We accordingly allow the appellant’s appeal to the extent that we substitute the conviction of murder with that of manslaughter contrary to **section 202** as read with **section 205** of the Penal Code. We of course, set aside the death sentence and in its place sentence the appellant to ten (10) years imprisonment. This sentence is to run from the date he was convicted by the superior court i.e. 20th August, 2007. It is so ordered.

Dated and delivered at Nairobi this 12th day of February, 2010.

P. K. TUNOI

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JUDGE OF APPEAL

E. O. O’KUBASU

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JUDGE OF APPEAL

J. G. NYAMU

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JUDGE OF APPEAL

**I certify that this is a
true copy Original**

DEPUTY REGISTRAR