



IN THE COURT OF APPEAL

AT NAIROBI

CRIMINAL APPEAL NO. 320 OF 2005

BETWEEN

MBOYA NDINDI APPELLANT

AND

REPUBLIC RESPONDENT

**(Appeal from conviction and sentence of the High Court of Kenya at
Machakos (Wendo, J.) dated 12th October, 2005**

in

H.C.CR.C. NO. 2 OF 2003)

JUDGMENT OF THE COURT

The appellant was tried by the High Court, Machakos with the aid of assessors on Information charging him with the offence of murder contrary to **Section 203** as read with **Section 204** of the Penal Code. He was alleged to have murdered one **Ndingi Kimanzi** who was his father on 20th July, 2001 at Ivuuni village, Kitui District. He was convicted after trial and sentenced to death thereby precipitating the present appeal.

On 20th July, 2001 **Ndingi Kimanzi** (deceased) left his home in the company of his wife **Kavele Ndingi** (PW1) (Kavele) and one of his sons for Emusi trading centre to meet **Ndululu Luvilu** (buyer) to whom he was selling a plot. He arrived at Emusi at about 8 a.m. and went straight to the kiosk of his son **Mutambuki Ndingi** (PW6) (Mutambuki) at the same trading centre. At about 12 noon the buyer arrived accompanied by his wife and one Ivyo Kithome – a witness to the transaction. The group sat under a shade outside Mutambuki's kiosk and the buyer paid Shs.2,500/= to the deceased being part payment of the agreed purchase price of Shs.4,500/=. One Kyumbu to whom the deceased owed Shs.2,500/= was present. The deceased paid Shs.2,500/= which he had received from the buyer to Kyumbu to clear the debt. Shortly thereafter, the appellant arrived at the trading centre carrying a panga and called the deceased and Kavele aside after which he demanded part of the proceeds of the sale of the plot. The deceased refused to give him any money saying that he would not give his money to anybody. **Elijah Muveva Ndingi** (PW3), a son of the deceased suddenly saw the appellant lift a panga and cut the deceased on the head and the deceased fell down. The appellant started chasing Kavele who started

screaming whereupon Mutambuki came out of his kiosk and found the deceased lying down while the appellant was preventing Kavele from leaving. He confronted the appellant but the appellant advanced towards him holding a panga and Mutambuki ran away. The appellant chased him but Mutambuki stumbled, fell down and the two started struggling. The appellant wanted to cut Mutambuki with the panga but Mutambuki held him tightly and was cut on the finger in the process. Meanwhile, **Robert Mwangela** (PW2) (Mwangela) a police officer on patrol in the area heard noises and went to the scene. He found the appellant lying on Mutambuki while holding a panga as Mutambuki was holding his hands. He snatched the panga, which was blood stained, from the appellant and separated the two. The deceased was lying nearby with a cut in the middle of the head exposing the brain tissue. The body of the deceased was collected from the scene by **Ag. IP. Justus Ondimu Mutomo** (PW9). A postmortem was performed on the body of the deceased by Dr. Kihungu on 2nd August, 2001. The deceased had a skull fracture over the occipital area exposing the brain tissue and the doctor formed the opinion that the cause of death was cardio-pulmonary arrest secondary to head injury. The postmortem report was produced by **Dramsen Kituku Nzioka** (PW7) under **Section 77 (1)** of the *Evidence Act*.

The appellant made a long statement in his defence stating, in essence, that, on the material day, he worked in the shamba until about 11.30 a.m. after which he left and took local brew; that he returned to the shamba at 1 p.m. and worked for about two hours; that Mutambuki found him in the shamba and persuaded him to agree to the sale of the plot by his father; that he opposed the sale for three reasons, namely, two of his brothers who were living in Nairobi had not consented to the sale, the plot was jointly owned and thirdly, the price of Shs.4,000/= was low. The appellant stated further, that Mutambuki slapped him and he fell down; that Muveva appeared and the appellant ran to the kiosk; that Mutambuki and Muveva followed him there and a fight ensued; that he picked a long piece of wood while Mutambuki went behind the kiosk and came with a panga. The tragic end to this incident is better depicted in the appellant's own words, thus:

“Mutambuki came raised the panga threatening to cut me. I raised the wood and he hit the wood. It is then my father had turned to come between us. From then I did not see my father because I was drunk. People did not separate us. Since I was being defeated I ran away into the crowd”.

Lastly, the appellant stated, in essence, that he did not have a good relationship with his brothers because they used to complain that he was preventing the deceased from giving them part of the dowry paid for the deceased's married daughters.

Mr. Agina, learned counsel for the appellant relied on the grounds of appeal contained in the memorandum of appeal filed by the appellant. He however abandoned ground 4, 7 and 8. The rest of the grounds deal with evidentiary matters which boil down to a complaint that the conviction was against the weight of the evidence.

There was overwhelming evidence that the deceased was cut with a panga at the back of the head causing a fracture of the skull exposing the brain matter and that he died instantly. However, the postmortem report referred to the body as that of a female. It was submitted in the superior court, in essence, that, since the postmortem relates to a body of a female the cause of the death of the deceased – a male, was not established. The postmortem report however indicates the name of the deceased as Ndindi Kimanzi which name matches with the name of the deceased in this appeal. Furthermore, there was evidence of **Matutu Muoki** (PW5) that he identified the body of the deceased to the doctor who performed the postmortem. Moreover, the injury that the deceased sustained is consistent with the injury described in the postmortem report. The superior court considered the issue and made a finding that the description of the body as that of a female was a mere mistake. The appellant has not appealed from that finding. There is no doubt that the postmortem report relates to the deceased and that the cause of death was due to the head injury caused by a panga.

The prosecution case was that the appellant approached the deceased at Emusi trading centre while armed with a panga and demanded a share of the proceeds of sale of the plot and when the deceased declined to give the appellant any money, the appellant cut him with a panga on the head causing the deceased to fall down after which he died almost instantly.

The appellant's case was that he was attacked by his brother Mutambuki after he opposed the sale of the plot by his father and that in the course of the fight Mutambuki fetched a panga and as he lifted the panga to cut the appellant, the appellant blocked it with a piece of stick and the panga fell down seemingly and accidentally injuring the deceased who had intervened in the fight. We say "*seemingly*" because the appellant stated that he did not see his father as he was drunk.

The trial Judge came to the conclusion that it is the appellant who cut the deceased with a panga after the deceased declined to give him a share of the sale price of the plot.

We have a duty to re-evaluate the evidence, reconsider it and make our own independent findings of the circumstances leading to the death of the deceased.

However, in doing so, we cannot interfere with the findings of fact by the superior court which were based on the credibility of witnesses unless it is demonstrated that no reasonable tribunal could have made such findings or that there existed errors of law (see **Republic vs. Oyier** [1985] KLR 353).

In the course of evaluating the evidence, the superior court stated:

"Those present at the scene where deceased died were PW1, 3 and 6. PW1 denied seeing exactly how or who cut the deceased as she was seated with them but facing a different direction. PW6 claims to have gone back into the kiosk when it all happened. It is only PW3 who saw accused lift a panga and cut the deceased and that PW6 responded to the commotion that ensued by enquiring from accused what had happened.

I had a chance to see these witnesses and assess their demeanour and have no doubt that the accused is the one who cut the deceased when he refused to part with some of the money from the plot (sic). PW6 found him with the panga. PW2 found accused holding the panga as they struggled with PW6 and snatched it from him".

There was ample evidence that the appellant had a panga when he approached his parents at Emusi trading centre. Kavele, his own mother, testified that the appellant had a panga and that he is the one who cut the deceased with it. Muveva, the appellant's younger brother, testified that the appellant had a panga in his pocket and that he lifted it and cut the deceased. The evidence of Kavele and Muveva that the appellant had a panga was supported by Mutambuki who testified that he came out of the kiosk after hearing commotion and found the appellant holding a panga. This witness did not say that he saw the appellant cutting the deceased. He was no doubt a truthful witness. The evidence of Mutambuki, was amply supported by an independent witness – APC. Mwongela, a police officer on patrol who found the appellant lying on Mutambuki and holding a panga while Mutambuki was struggling with him. The appellant stated that he had gone to the shamba and did not state what happened to his panga.

Furthermore, the statement of the appellant as to how the deceased sustained the fatal injury is evasive and inconsistent with, his earlier statements.

The appellant was committed by a subordinate court to the High Court for trial for offence of murder after the subordinate court was satisfied that the evidence contained in the committal bundles was sufficient as the law provided before it was repealed. He told the police in his statement in the committal bundles as follows:

"I was fighting with my two brothers over the sale of our farm by force and I was reluctant to be a part to that. In the process a fight ensued and my elder brother, namely Mutambuki Ndindi raised his stick to hit me. The stick hit a panga which was in my hands and the panga cut my father who had intervened in our fight to separate us and he died instantly".

The appellant repeated this version on oath during committal proceedings which proceedings were part of the trial court's record where he stated vividly in part:

“When Mutambuki raised a stick to hit me, I raise my panga to block the stick. The stick hit the panga till it fell off my hands. The panga was sharpened both sides. After the panga came off my hands its edge pieced my father on the head”.

Thus, the appellant’s statement of defence in the superior court that it is Mutambuki who had a panga is inconsistent with his earlier statements which statements are consistent with the prosecution case. Moreover, the explanation of the appellant in his earlier statements and in his defence in the superior court that the deceased sustained the fatal injury when the panga accidentally fell on him is improbable considering the serious nature of the injury which indeed caused instant death.

The findings of fact by the superior court were based on the credibility of the witness as assessed by the trial Judge. Those findings were consistent with the findings of the two assessors who remained throughout the trial and who formed the opinion that the appellant was guilty of murder.

After re-evaluating the evidence, we are satisfied on the basis of the overwhelming evidence that it is the appellant who cut the deceased on the head causing his instant death.

The appellant claimed that he had taken some local brew and was drunk. He did not however disclose how much of the local brew he had consumed but he stated that he went back to work thereafter. No one else testified on the appellant’s drunkenness. The trial Judge considered the defence of intoxication and rejected it. The defence of intoxication would have been available to the appellant in the circumstances stipulated in **Section 13 (2)** of the Penal Code which circumstances did not arise in this case.

A plea of guilty to manslaughter was offered at the trial but was rejected by the State Counsel, quite correctly in our view. The superior court made a finding that malice aforethought was established as the evidence proved that the appellant intended to cause grievous to the deceased. By **Section 206** of the Penal Code, malice aforethought is deemed to be established by evidence proving, among other things, an intention to cause death or to do grievous harm.

There was overwhelming evidence that the appellant called the deceased aside and demanded a share of the proceeds of sale of a plot and when the deceased refused to give any money, the appellant cut the deceased on the head with a panga. The appellant must have done so with tremendous force as the deceased sustained a fatal injury and instant death.

The reasonable inference is that the appellant thereby intended to cause death or grievous harm to the deceased, which death in fact occurred. We are satisfied that malice aforethought was established and that there was a clear motive for the murder, although motive is no relevant for criminal responsibility – see **Section 9 (3)** of the Penal Code.

For the foregoing reasons, we dismiss the appeal in its entirety

Dated and delivered at Nairobi this 30th day of April, 2010.

E. O. O’KUBASU

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR