



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAKURU
CRIMINAL APPEAL 277 OF 2006

BETWEEN

JOSIAH AFUNA ANGULUAPPELLANT

AND

REPUBLICRESPONDENT

(An appeal from a conviction and sentence of the High Court of Kenya at Nakuru (Musinga, J.) dated 4th April, 2006

in

H.C.CR.C. NO. 44 OF 2002)

JUDGMENT OF THE COURT

This is the first and final appeal by *Josiah Afuna Angulu* (the appellant) against his conviction by the superior court (Musinga J) sitting in Kisii, for the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code. The superior court found as proved beyond doubt the Information filed by the Attorney General on 18th March, 2002, alleging that the appellant did on the 28th day of March, 2000, at Baruti Farm in Nakuru District of the Rift Valley Province, murder **Wilson Kipkoros Tanui** (the deceased). Upon his conviction, the appellant was sentenced to suffer death as by law provided.

Although the appellant put forward some nine grounds of appeal in his memorandum which he drew up in person, and learned counsel representing him, Mr. Ochang' John Ajigo added a further three grounds in a supplementary memorandum, Mr. Ajigo ended up urging the appeal on the main ground that the case against the appellant was not proved beyond reasonable doubt and he was therefore entitled to acquittal. We shall examine the broad submissions made in that regard shortly.

The facts of the case came from eleven prosecution witnesses but only two of them testified as eye-witnesses. Those were **Mrs. Mary Taputany Kilel** (PW5) (Mary), and her husband **Stephen Kiptanui Kilel** (PW2) (Kilel). They were the parents of the deceased, a 40 year old man working as a casual for Kenya Pipeline Company in Nakuru. The family's farm shared a boundary with the appellant's farm and their houses were barely 30 metres apart. There never was any existing quarrel between the two families before and in fact the appellant was a friend of the deceased. But on 28th March, 2000, according to Mary, she left her house at about 8 a.m. to fetch water from the river. She left the house unlocked and her husband, Kilel, was either looking after cattle, according to Mary, or at Njoro according to Kilel himself. Mary returned from the river after about an hour and to her surprise found all the utensils and other things she had left therein gone. They included cups, sufurias and tables. The appellant then appeared on the scene holding a bow and arrows and told her that he had taken away the property because it was his. He meant to attack Mary but she ran away screaming and hid behind the house whereupon the appellant returned to his house. She only came out of her hiding place when Kilel came home at about 11 a.m. On arrival home from a trip to Njoro, Kilel said he opened his house and was surprised to see the utensils and other property he had left there missing. Presently his wife, Mary, appeared on the scene and told him that she was chased away by the appellant who had a bow and arrows. She did not know where the missing utensils were. As they talked, the appellant was spotted by Mary hiding behind some bush holding two arrows and a bow. Kilel talked to him and the appellant told him that he (the appellant) was "*going to do something*". Then the appellant ran away. Kilel decided to report the matter at St. Lukes Administration Police Post, about three kilometers from the scene, and he found **APc Simon Maiyo** (PW8) and **APc Martin Kimani** (PW9). He made the report and sought the arrest of the appellant but the officers said they would come at 2 p.m. since they did not have enough personnel at the post. Kilel went back home. On arrival at home at about 12.30 p.m., Kilel recalls that he found his wife and the appellant standing near their house. The appellant was still holding a bow and arrows, but was saying nothing. At about 3 p.m., the deceased was coming home from his place of work along a road which passes by the appellant's house. As he passed by the appellant's house the appellant, who was about 10 metres away, shot him once on the stomach and the deceased fell. At first Kilel said there was no talking between the two, but in cross-examination he said the appellant shouted at the deceased. He also said he was alone in the house as he witnessed all this since Mary was at the road looking for firewood, but Mary's recollection was that Kilel did not witness the attack as he was outside the house. She was the one who saw the appellant fire the arrow at the deceased and she ran out screaming. Kilel also went towards the deceased screaming but did not talk to him.

The screams attracted many neighbours among them **Beatrice Chepkurui Tanui** (PW4) who was the deceased's sister in-law; **Francis Kibet arap Keter** (PW1), the deceased's cousin, **Michael Koech Mojo** (PW3), and more than 50 others. Those who testified confirmed that they found the deceased lying about 10 metres from the appellant's house with an arrow sticking out of his stomach bleeding. Francis Keter with others sought transport to take the deceased to Nakuru Provincial General Hospital, while others went to St. Lukes Administration Police Post to report the incident, and yet others set upon the appellant, beat him up, pushed him into his house and apparently set it on fire. As one part of the house was burning, APc Maiyo and APc Kimani arrived at the scene and ordered the appellant to come out which he did and was placed under arrest and taken to Nakuru Police Station to face a charge of assault. The deceased however did not survive the arrow shot as he died a few hours after removal of the arrow head and stitching of the wound. The report was then made to **Pc. Joseph Chirchir** (PW10) who was assisting the investigations officer and who arranged for a postmortem and recorded statements from various witnesses. After identification of the body by two of the deceased's brothers, PW6 and PW7, **Dr. Bw'Otieno** carried out a postmortem, a report of which was produced by **Dr. Maina Kimani** (PW11). He confirmed that the deceased had a penetrating abdominal injury about 1.5 cm to the right of his umbilicus, and a right paramedical scar which was stitched. In his opinion the cause of death was consistent with the penetrating abdominal injury. The appellant was also examined and was found wearing a blood stained T-shirt and six small cut wounds on the scalp which were stitched. He was fit to stand trial.

In his unsworn defence, the appellant stated that on the material day he rode his bicycle to Nakuru town to purchase some stock for his potato business. Upon his return home however, he saw from a distance smoke coming out of his house. He dropped his bicycle and ran towards his house. He then saw some

people following him and some threw stones and hit him, while others attacked him as he entered his house beating him unconscious. He came to the hospital and was only informed by the police that they had rescued him. He was thereafter charged with the offence of murder which he knew nothing about.

That defence was roundly rejected by the superior court as untenable in view of evidence which the learned Judge found clear and credible that the appellant was placed at the scene of the crime and was seen by Kilel and his wife, Mary, committing the offence. He delivered himself as follows:

“Having carefully considered all the evidence that was tendered by the prosecution witnesses and having considered the accused’s defence, it is clear that PW2 and PW5 saw the accused shooting the deceased using a bow and arrow. PW5 had been chased out of her home by the accused who was at the time holding a bow and arrows. She reported that incident to her husband, PW2, who in turn reported the incident to PW8 and PW9. However, before the administration police could go and arrest the accused, a report was made to them that the accused had shot the deceased. There were several witnesses who heard screams from the deceased’s home and when they found the deceased lying down with an arrow stuck to his stomach. An arrow head was removed from the deceased’s stomach after he died.

In light of the above evidence there is no doubt that the accused committed the offence of murder. He shot the deceased with malice aforethought. His defence is untenable and cannot hold any water in view of the clear evidence of the prosecution witnesses who saw him shooting the deceased.”

Those are the findings which aggrieved the appellant.

It was the submission of his counsel, Mr. Ajigo that the inconsistencies and contradictions evident in the evidence of the two star witnesses, Kilel and Mary, were material enough to discount the entire evidence of those two witnesses. He pointed out, and is borne out by the record, that Kilel was only partly cross-examined before the trial was adjourned but he died before the resumed hearing. His evidence was therefore only partly tested. He also submitted that a crucial angle in the whole case was not explored and therefore left a gaping hole in the prosecution case. That is the quarrel between the appellant and Mary, as testified by Kilel, which would import “*constructive provocation*”, and the unclear issue of missing utensils and whether the appellant spoke to the deceased before he shot him. Mr. Ajigo also attacked the lack of clarity on the evidence relating to the arrow found on the deceased, submitting that there was no evidence to connect the arrow head removed from the deceased with any arrow retrieved from the appellant as none was recovered. In view of those shortcomings, he submitted, it was unsafe to convict the appellant for the offences of murder or any offence at all.

For his part, learned State Counsel, Mr. Vincent Obundi Nyakundi conceded that there may well have been a quarrel between the appellant and Mary which could be construed as provocation but, in his submission, such provocation could not avail the appellant as there had been time for his passion to cool between 8 a.m. and 2 p.m. The appellant was armed and had the intention “*to do something*” which he did by shooting someone who was not involved in the quarrel, the deceased. As for the full testing of Kilel’s evidence, Mr. Nyakundi submitted that the witness had given sworn testimony of the essential facts of the case before he died and there was no error in principle in believing such evidence.

We have examined the evidence tendered in court in some detail because it is our duty as the first appellate court to reassess and re-evaluate such evidence and to reach our own independent conclusion in the matter. We have also carefully considered the submissions of both counsel and in the end, we are persuaded that the evidence on record could only support the lesser offence of manslaughter.

The evidence of the two eye-witnesses Kilel and Mary may be short on full consistency in every detail and indeed the evidence of Kilel may not have been fully tested in cross-examination. We have no doubt however that the appellant was at the scene of the crime and not anywhere else as purported by him. The evidence of Mary and Kilel in this regard was believed by the superior court before whom those witnesses testified and we have no reason to doubt their credibility. The evidence is however short on what the

quarrel over utensils was all about, and at what point and circumstances the lethal shot was fired. The doubtful evidence as to whether the deceased was also involved in the quarrel and whether he said anything before his death, casts a dark shadow on the evidence establishing *mens rea*. In law the benefit of those doubts go to the appellant and we so find.

We are in no doubt that it was the appellant who shot the arrow which resulted in the deceased's death. It is an unlawful death and the appellant will stand convicted of the lesser offence of manslaughter. We allow the appeal, quash the conviction for murder and set aside the sentence of death. We substitute therefor a term of imprisonment for 12 years which shall commence from the time of his first conviction on 4th August, 2006.

Orders accordingly.

Dated and delivered at Nakuru this 28th day of May, 2010.

P.K. TUNOI

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR