



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: O’KUBASU, GITHINJI & WAKI, JJ.A.)

CRIMINAL APPEAL NO. 207 OF 2007

BETWEEN

BARNABAS OBUNGA OMBOKE APPELLANT

AND

REPUBLICRESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Rawal, J.) dated 20th December, 2005

in

H.C.CR.C. NO. 40 OF 2004)

JUDGMENT OF THE COURT

BARNABAS OBUNGA OMBOKE, the appellant, was tried by the High Court of Kenya at Nairobi on an information charging him with murder contrary to **section 203** as read with **section 204** of the Penal Code. The particulars of the offence in that information were as follows:-

“BARNABAS OBUNGA OMBOKE: On the 10th day of February, 2004 along Juja road near Pangani Police Station in Nairobi, within Nairobi Area murdered ANTHONY MWANZIA.”

The trial of the appellant commenced on 6th June, 2005 before Rawal, J. with the aid of assessors (as the law then provided). The summary of prosecution case was that on 10th February, 2004, **Pc Solomon Makau** (PW1), **Pc Ndunda** and **Pc Mwanzia** (deceased) all attached to Pangani Police Station were deployed to combat crime along Juja Road when they heard gun shots from the direction of Pangani Shopping Centre. Suddenly, a Peugeot 504 saloon appeared and it was being chased by a green Land Rover. Pc Makau, Cpl. Kimanjo and the deceased Mwanzia joined in the chase and when the white Peugeot 504 saloon reached the junction of Ring Road/Ngara, there was traffic jam which forced the driver of the Peugeot saloon to abandon it and start running towards Pangani Police Station. Pc. Makau and his group gave chase and the driver of the Peugeot was apprehended by Cpl. Kimango who ordered him to raise his hands. He obeyed and on being searched he was found with nothing. As the police

officers surrounded the man he grabbed Pc Makau's firearm and fired at random injuring Cpl. Kimengwa and killing the deceased on the spot. The man was the appellant. This incident was witnessed by **Cpl. Alfred Kimengwa** (PW2) who testified inter alia:-

“Before they arrived, I was trying to look back and the man was struggling to free himself. I was holding him by his waist belt and P.C. Makau was on my left side – P.C. Mwanzia (deceased) was on my right side. P.C. Ndunda was on my far right. P.C. Makau was raising his gun at him.

At that moment as I was looking at those officers the person moved towards P.C. Makau. Before I could know what was he (sic) up to, I heard a gun shot. Immediately I pushed person back and I also went a step backward. I drew my pistol from hand pointed at him ordering him to sit down. He sat down and I saw the deceased falling down. That is when I realized he was shot at the neck.”

Cpl. Elius Kimicha (PW5) who was the investigating officer in this matter stated in his evidence in chief as follows:-

“We moved near the crowd. To my surprise a police officer fell down and bleeding (sic) from his neck. I saw other officers searching the place. I cannot recall their number. The two officers were trying to lift the officer.

There were members of public. I did see a man who was sitting down and then I realized that he was the man we were following. I caution (sic) that he was the one who was driving the vehicle. There was, as I recall one officer guarding that person. The person whom we were following is in court. (Accused identified)”.

From the scene, the deceased was taken to Guru Nanak Hospital while the appellant who was also bleeding from his back was taken to Kenyatta National Hospital. The injured police officer (Pc Mwanzia) later died as a result of the bullet wound in his neck. According to the post mortem report, the cause of deceased's death was *“gun shot neck, injury carotid jugular vessels and cervical spine.”*

When put to his defence, the appellant stated on oath that he was a businessman who had gone to assist a friend whose vehicle had broken down. On the material evening his friend transferred his luggage to his (appellant's) vehicle and started driving. He was overtaken by a vehicle and his friend told him that the vehicle could belong to bad people. As the appellant had **Shs.100,000/=** in his pocket, he became worried and indeed that other vehicle blocked his way. He sensed danger. The people in the other vehicle started firing and as the appellant tried to escape he was shot in the shoulder. He tried to drive faster but as there was traffic jam he abandoned his vehicle and started running towards Pangani Police Station. Before he could reach Pangani Police Station, he saw police officers who arrested him as he continued shouting *“thief catch him”*. He was ordered to raise his hands and as he obeyed the order somebody came from the crowd and asked *“Where is he”* and even before he was answered he shot another police officer. From there he was taken to Kenyatta National Hospital where he was admitted for seven days. According to the appellant, the deceased was shot by another police officer.

The learned judge summed up the evidence and the law to the assessors who were of the unanimous view that the appellant was not guilty. The learned judge however disagreed with the assessors and came to the conclusion that the appellant was guilty as charged and she proceeded to sentence him to death. In the course of her judgment delivered on 20th December, 2005, the learned judge said:-

“I do not have any doubt that it was the accused, in desperation to run away, struggled with PW1 who was armed and during this struggle the fire arm was triggered which killed the deceased person.

The question shall remain whether the accused had an intention to kill him? That may not be but being an Army officer he knew or ought to have known that he was struggling to get a

firearm which, if triggered, could cause death of a person. With this knowledge, I could find that the accused had malice aforethought as per section 206 of the Penal Code.”

Being aggrieved by the foregoing conviction and sentence, the appellant, through his counsel, filed an appeal and in a “*Supplementary Grounds of Appeal*” (which should have been Supplementary Memorandum of Appeal) set out the following three grounds:-

“1. THAT the trial judge erred in law in finding that the evidence adduced against the appellant proved the charge against him beyond any reasonable doubt.

2. THAT the trial judge misdirected herself by ignoring the defence advanced by the appellant.

3. THAT the trial judge erred in law in failing to write a judgment which complies with section 169(1) of the Criminal Procedure Code and by failing to properly analyze the evidence adduced before her by the prosecution.”

That is the appeal that came up for hearing before us on 22nd April, 2010 when Mr. Kanyangi assisted by Mr. Kowino appeared for the appellant, while Mr. O’mirera (Senior Principal State Counsel), appeared for the State. In his submissions, Mr. Kanyangi argued all the three grounds together. It was Mr. Kanyangi’s submission that the evidence adduced by the prosecution was not sufficient and that the appellants’ defence was not considered. He pointed out that at the time of the arrest the appellant had been shot in the back. Mr. Kanyangi went over the evidence of the police officers at the scene and submitted that it was impossible for the appellant to grab a gun and shoot the deceased in the manner described by the two witnesses at the scene. Mr. Kanyangi further submitted that the incident took place after 7.30 p.m. and hence PW1 could have accidentally shot the deceased. It was Mr. Kanyangi’s view that the appellant’s version was the most likely version and that even the assessors returned a verdict of not guilty.

On his part, Mr. O’Mirera submitted that the case against the appellant was proved beyond doubt. He was of the view that the trial court was right in rejecting the appellant’s version.

This being a first appeal, it is our duty to subject the evidence adduced at the trial to a fresh and exhaustive scrutiny. In KINYUA V. R. [2003] KLR 301 at pp. 303-304 this Court said:-

“This being the first (and last) appeal it is our duty to subject the evidence adduced to a fresh and exhaustive scrutiny so that we can draw our own conclusions on the conflicting evidence. In OKENO V. R [1972] EA the predecessor of this Court made the following observation as regards the function of the first Appellate Court:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R. [1957] EA 336) and to the Appellate Court’s own decision on the evidence. The first Appellate Court must itself weigh conflicting evidence and draw its own conclusions. (Shantilel M. Ruwal v. R [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post [1958] EA 424.”

This is a case in which the deceased police officer died as a result of a gun shot wound on his neck. The incident took place not very far from Pangani Police Station where the appellant claimed he was running to for his safety. It was the prosecution case that it was the appellant who grabbed a gun from **Pc Makau** (PW1) and shot the deceased. But the appellant in his defence testified that he ran towards the police station after a suspected vehicle blocked his way and as the people in the suspected vehicle started firing in the air, he ran towards the police station for his safety; but while he was under arrest, a person emerged

from the crowd and shot the other police officer.

On our own re-evaluation of the evidence, we find that the shooting took place at a crowded scene, and there is no certainty about the person who fired the fatal bullet that killed the deceased. We have reproduced portions of the evidence of **Pc. Makau** (PW1), **Cpl. Alfred Kimengwa** (PW2) and **Cpl. Kimicha** (PW5) and on examining their evidence as compared with the sworn testimony of the appellant, it would appear that the credibility of those police officers was in doubt. Even Pc Makau was not in a position to say what firearm he was carrying on the material day. We have also considered the evidence of the Ballistic expert **Emmanuel Lagat** (PW4) but his evidence does not help the prosecution case against the appellant. It is to be noted that the appellant ran towards the police station to seek refuge and when he was ordered to raise up his hands he obeyed. It is therefore illogical that one who had already raised his hands could grab a gun and start shooting the very police officers that he was seeking assistance from.

We would agree with Mr. Kanyangi that the prosecution case raised many doubts which must be resolved in favour of the appellant.

In view of the foregoing, we are satisfied that the case against the appellant was not proved to the required legal standard in criminal cases. Consequently, we allow the appeal, quash the conviction and set aside the death sentence. The appellant is to be set free forthwith unless otherwise lawfully held.

Dated and delivered at NAIROBI this 4th day of June, 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