REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NYERI

CRIMINAL APPEAL 137 OF 2000

AYUB KIBUNGE……..……APPELLANT

AND

REPUBLIC…….RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Meru (Ongundi, j) dated 17th November 1995

in

H.C.CR.C. NO 43 of 1993
****
JUDGMENT OF THE COURT

The appellant was on 7th November 1995 convicted by the superior court Meru (Ongundi J) of murder contrary to **section 203** as read with **section 204** of the Penal Code and sentenced to death as by law prescribed.

The appellant thereafter prepared a notice of appeal apparently with the help of a prison officer. The notice of appeal is dated 25th November 1995 and is thumb-printed by the appellant. The notice of appeal was however lodged at the High Court registry Meru on 8th July 2010 over 15 years after the judgment of the superior court appealed from. By **rule 58 (1)** of the Court of Appeal Rules (rules) a person who desires to appeal to this Court is required to lodge a notice of appeal within fourteen days (14) of the date of the decision. However **rule 66(1)** of the rules provides:

> **" If the appellant is in prison he shall be deemed to have complied with the requirements of rules 58, 63, 64 and 65 if he gives to the officer in charge of such prison the notice of appeal, memorandum of appeal or statement provided for in those rules respectively."**

Furthermore by **rule 66(2)** the time between the time an appellant gives notice of appeal to the officer in charge of a prison and the time the prison officer lodges it with the registrar of the court is excluded in computing time. By **rule 58(1)** a notice of appeal institutes the appeal. It follows therefore that although the officer in charge of the prison lodged the notice of appeal with the registrar Meru after a very long delay, nevertheless the appeal is by the rules deemed as filed within the prescribed time and is therefore competent.

The appellant was tried with the aid of assessors as the Criminal Procedure Code then provided. The law requiring trial with aid of assessors has since been repealed and murder trials are now tried by a Judge without assessors.

The prosecution called four witnesses who gave brief evidence in support of the charge. The prosecution case was briefly as follows:-

The appellant and Grace Tirindi (PW1) got married sometime in 1977. However they separated sometime later and Tirindi returned

to her parents' home. On 3rd September 1992 Isaac Mithimo the deceased went to a neighbouring home to buy trees for building a house from the grand mother of Helen Gacheri (PW2) (Gacheri) then aged 14 years. Thereafter Tirindi went to the same home to fetch fire after which she returned to her house. Apparently the deceased followed Tirindi to her house and entered into her house. Tirindi lit a tin lamp and as she was lighting the fire, the appellant entered into the house and cut Tirindi on the head and shoulder. Thedeceased screamed. Tirindi became unconscious. Meanwhile Gacheri heard screams from the house of Tirindi. Somebody was screaming that he was dying. She could hear the sound of something being cut. She went outside and she heard another sound of cutting. She then saw the appellant coming out of the house of Tirindi holding a panga in the right hand. He called him by his name "Ayub" loudly whereupon the appellant ran away. Gacheri screamed and many people went to the scene. When Gacheri entered into the house of Tirindi, she noticed that Tirindi had cuts on the head and shoulder while the deceased had multiple cutson the legs and all over the body. The information reached Douglas Kirimana (PW3) a brother of Tirindi who went to the scene immediately. He found Tirindi seated outside the house with severe cut wounds. Tirindi informed her brother that she had been cut by the appellant. Kirimana also saw the deceased lying at the side of the door with severe cut wounds on the legs. The appellant was arrested in his house on the following day in the presence of Kirimana. A blood stained panga and blood stained clothes were recovered from the appellant's home. On 8th September 1992 Kirimana and another person identified the body of the deceased to Dr. Macharia (PW4) who performed the postmortem. According to Dr. Macharia the deceased sustained a deep cut at the left side back of the neck 6" in length, deep multiple cuts on left leg with fracture of the femur and occipital lobe of the brain was severed. Dr Macharia formed the opinion that the cause of death was due to penetrating head injury with haemorrhagic shock due to loss of blood.

The appellant gave sworn testimony at the trial in which he denied killing the deceased. He testified that on the material day he was in his shamba ploughing after which he slept. The appellant further testified in his evidence in cross-examination that he did not visit Tirindi on the material day, that he did not know the deceased and that he did not assault the deceased.

The trial Judge evaluated the evidence of Tirindi and Gacheri thus:

> **"Tirindi (PW1) said she saw accused with the help of the moonlight. She had been lighting fire when he walked in. The tin lamp was also on. The intensity of the light was not stated. The accused was wearing a blue shirt and a brown trousers. Gacheri (PW2) alleged she saw the Accused with the help of moonlight. It was full moon and was as bright as day. She saw a panga in his right hand. She called out his name Ayub before he fled into the night. She observed him for 30 seconds. As I said to the assessors Gacheri (PW2) being 18 years when she testified did not have to be examined Voire dire by the court. She was an adult.**
>
> **Tirindi (PW1) maintained she was inside the hut when she saw the accused with the help of moonlight. It was a grass thatched hut. The lamp was also on. Perusing the entire evidence I find it was not shaken at all. She left me with indelible impression that she saw her husband well.**
>
> **"There is no indication Gacheri (PW2) could have been influenced to give the kind of testimony she gave. The moonlight was as bright as day on full moonlight. Again both witnesses agreed on the clothes accused had that night. The failure by the police to produce his clothes and panga does not in my considered opinion overshadow the clarion evidence of the two key witness.**
>
> **Nobody testified seeing accused cut the deceased but there is evidence which I accept how he walked into Tirindi's hut armed with a panga, cut Tirindi and there was only one other person inside- the deceased. After a short while accused leaves the hut amid screams, runs away and the deceased is fatally cut. That evidence leads to only one presumption, that it is the accused who murdered the deceased. There are no inference in favour of the defence that can weaken the inference of guilt on the part of the accused."**

There are five main grounds of appeal namely, that the circumstances were not conducive to positive identification; that there was no direct evidence to link the appellant to the commission of the offence; that the murder weapon and the clothes recovered from the house of the appellant were not produced; that the prosecution failed to summon essential witnesses like the investigating officer and that defence of the appellant was not adequately considered. Mr Wahinya learned counsel for the appellant submitted, among other things, that the evidence relied on by the prosecution was not safe, that there was no evidence linking the appellant with the crime; that the evidence of Tirindi's relating to the identification of the appellant was very brief and untruthful; that the prosecution did not call independent witnesses, that the

prosecution evidence was contradictory; that the exhibits recovered were not produced and that there is no reason why the deceased should have gone to Tirindi's house the couple having parted ways over 28 years before. On the other hand Mr Kaigai learned Principal State counsel submitted, among other things, that there was overwhelming evidence against appellant that the trial judge analysed the evidence and that the appellant's defence was considered.

We appreciate that we have a duty as the first appellate Court to re appraise the entire evidence and draw our own conclusions.

However this Court would not interfere with a finding of fact by the trial court unless the finding of fact is based on no evidence or misapprehension of evidence or where the court has acted on wrong principles. (**Ogeto v Republic { 2004} 2 KLR 14**. Moreover we cannot interfere with those findings by the trial court which were based on thecredibility of witness unless no reasonable tribunal could have made such findings or where it is shown that errors of law existed **Republic v Oyier {1985} KLR 353.**

The prosecution case was dependent on the evidence of two witnesses, Tirindi and Gacheri. Tirindi gave evidence of the circumstances in which she recogniszed the appellant. Her hut was grass thatched and there was bright moonlight. Her tin lamp was also on. She described the clothes the appellant was wearing as a blue shirt and brown pair of trousers. She testified that she saw the appellant clearly. The trial judge made a finding that her evidence was not shaken and believed her evidence. Her brother Kirimana who visited the scene immediately testified that Tirindi told him that she was cut by the appellant. The appellant was arrested on the following day. Gacheri on her part testified that she saw the appellant whom she knew before coming from the house of Tirindi holding a panga and that when she called him by his name, he ran away. She testified that when she saw the appellant she was standing only 3 metres from the house of Tirindi and that there was full moon which was as bright as day. She described the clothes which appellant was wearing as a blue shirt and brown trousers which is similar to the description of the clothes given by Tirindi.

The trial judge made a finding that there was no indication that Gacheri had been influenced and believed her evidence.

The three assessors who were assisting the trial Judge believed the evidence that the appellant was recognized by the two witness and gave a unanimous opinion that the appellant was guilty of murder. It is true that the prosecution did not call a vital witnesse – the investigating officer with the result that the blood stained panga and the blood stained clothes recovered from the house of the appellant according to the evidence of Kirimana were not produced. However failure to produce the exhibits did not occasion any failure of justice because the trial judge did not rely on the evidence of recovery of the panga and clothes.

Further although the prosecution did not call the investigating officer there was evidence from Kirimana that the person he found inside the house of Tirindi with serious cut wounds is the same person whose body he identified to Dr Macharia for postmortem. The evidence of Tirindi, Gacheri, Kirimana and Dr Macharia leave no doubt that the deceased died from the fatal injuries inflicted when he was inside the house of Tirindi. The Court can only make an inference that the evidence of the uncalled investigating officer could have been favourable to the appellant only if the prosecution case against the appellant was barely adequate. (see **Bukenya and Others vs Uganda {1972} EA 549)**

It is true that Tirindi did not testify that she saw the appellant cut the deceased. The circumstantial evidence however irrestibly shows that the person who entered into the house of Tirindi and was seen coming out of the house is the same person who killed the deceased. The trial court considered the appellant's defence of alibi alongside the prosecution evidence and rejected it.

The question whether or not Tirindi and Gacheri recognized the appellant is a question of fact. The three assessors believed that the two witnesses recognized the appellant. The trial Judge similarly believed the two witnesses that they recognized the appellant. On our own evaluation of the evidence as above we are satisfied as the trial Judge that the evidence of Tirindi and Gacheri was credible and that there is no justification for interfering with the finding of the trial court.

In the upshot we dismiss the appeal in its entirety.

Dated and delivered at Nyeri this 4th day of November, 2010.

S.E.O. BOSIRE

……..
JUDGE OF APPEAL

E.M. GITHINJI

…….
JUDGE OF APPEAL

J.G. NYAMU

……
JUDGE OF APPEAL

I certify that this is a
true copy of the original

DEPUTY REGISTRAR