



**IN THE COURT OF APPEAL OF KENYA**

**AT Nakuru**

**CRIMINAL APPEAL NO. 338 OF 2006**

**GEOFFREY KIMANI NDUNGU .....APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

*(Appeal from a judgment of the High Court of Kenya at*

*Nakuru (Muga Apondi, J) dated 24<sup>th</sup> November, 2006*

**in**

**H.C..Cr.C. No. 59 of 2002)**

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**JUDGMENT OF THE COURT**

The appellant, *Geoffrey Ndungu Kimani*, was on 24<sup>th</sup> November, 2006 convicted by the superior court, *Muga Apondi, J.* for the offence of murder contrary to *section 203* as read with *section 204* of the Penal Code. It had been alleged in the information filed by the Attorney General on 31<sup>st</sup> July 2002 that:

*“On the 23<sup>rd</sup> day of October 2001 at Karura Farm, Gilgil, in Nakuru District of the Rift Valley Province, jointly with another not before court unlawfully murdered JOHN MWENJA.”*

The trial was conducted with the aid of three assessors but, at some point, one of the assessors absented himself and the trial continued with two assessors. Although the prosecutor stated the reason for the absence of the assessor, no orders were made accepting those reasons and therefore dispensing with the assessor. That was a serious omission which would have vitiated the trial. As we shall shortly see, however, there were more serious transgressions which militate against the conviction of the appellant. What are the facts of the case?

At about 9.15 p.m. on 23<sup>rd</sup> October, 2001, *David Kariuki Ng’ang’a* (PW1) was watching television in the house of his employer in Karura Farm, Gilgil. He then heard screams by someone in distress on the Nairobi-Nakuru highway about 100 metres away. He armed himself with two sticks and walked to a neighbour's house, *Stanley Njane Macharia* (PW2) who was asleep and woke him up. He told him about the screams and asked him to come out with a torch. Macharia gave Ng’ang’a a torch and he took a bow and arrows and some sticks. They both headed towards the direction of the screams and on reaching the

scene, Ng'ang'a shone the torch. He saw three people: the appellant, one Munyui and the deceased. According to him, the appellant and one Munyui were assaulting the deceased using "*sticks from a nearby fence or shrub*". He knew the appellant and the deceased as his neighbours while Munyui was the appellant's friend. Ng'ang'a then told the two to leave the deceased alone but he and Macharia ran away after the assailants "*went to collect other pieces of timber*". The two slept at Macharia's house. The following morning at 6.30 a.m., Ng'ang'a and Macharia returned to the scene but found no one. They went through the appellant's house and found the deceased lying outside. The deceased had a swollen face and hands and he told them he was feeling pain in the chest and stomach. The deceased said he had been brought there by the appellant and Munyui. At that time, the appellant was in his house and he reportedly came out and ordered the deceased to leave before returning to his house. Ng'ang'a then went to attend to his work until 1.00 p.m. when he went to the deceased's two roomed mabati house and found him being fed on tea and bread, which he vomited out. He was unable to talk. Later at 5.00 p.m. Ng'ang'a heard the deceased was taken to hospital.

While Macharia confirmed how he was woken up by Ng'ang'a at 9.45 p.m. and how they armed themselves and headed to the scene, he said they asked the two assailants why they were beating the deceased and instead of responding, the assailants went to look for other sticks whereupon, Ng'ang'a and Macharia ran away and went to sleep in his house. The following day they went to the appellant's house and found the deceased who had swollen hands and complained about pain in the chest, stomach and legs. They never talked to the appellant who was standing by the window in his house nearby. Macharia went away and heard later that the deceased had been taken to hospital.

That was all the evidence tendered by the prosecution. Apart from stating that they heard the deceased was taken to hospital, none of the two witnesses testified that he had died; let alone the cause of death.

The appellant gave sworn testimony in his defence and denied that he was at the scene of the crime on the day in question. He did not know Ng'ang'a who had said he was his neighbour and he had nothing to do with the assault of the deceased. He stated that he was doing business in Sirare Market since 2001 until he returned to Gilgil where he was arrested for no reason.

The two assessors remaining in the trial were unanimous that the appellant was not guilty of the offence charged. The learned trial Judge however, despite condemning the prosecution who "*never availed any additional witnesses for reasons better known to themselves*" proceeded to convict the appellant stating:

***"The two witnesses were able to recognize the assailants through the torch that was flashed by the PW1. In addition to the above, both witnesses knew the assailants who were their neighbours. Significantly, the deceased succumbed to the injuries that he sustained and died on the following day though the prosecution never availed any medical evidence, it is apparent that the deceased died within twenty four hours of the assault. It is obvious to this court that the deceased must have died as result of the injuries that she sustained on the material night. Though the accused strenuously denied assaulting the deceased, his story did not ring true. Secondly, it is apparent that both the PW1 and the PW2 did not have any grudge whatsoever against the accused to motivate them to frame such a serious charge against him. Despite the fact that the two assessors present, had returned a plea of "Not Guilty" against the accused, the evidence on record is overwhelming against him"***

With respect, there was no basis for the conclusion made by the learned Judge that the deceased had died or died within 24 hours of assault and that he died as a result of the injuries. In the absence of any evidence about the actual death or a plausible explanation about unavailability of such evidence, such conclusion is incapable of being drawn. Similarly, the lack of medical evidence establishing the cause of death leaves a gaping hole in the prosecution case which is incapable of filling by conjecture. The learned Judge's findings in this regard amounted to no less.

Furthermore, the defence of the appellant was dismissed with contempt but, we think, erroneously so. In essence the defence amounted to an *alibi* and had been consistent since his arrest. The record shows that after his arrest the appellant was taken through the motions of committal proceedings which at the time were a requirement of the law. On his first appearance before the Senior Principal Magistrate, on 18<sup>th</sup>

September, 2002, an *alibi* warning was administered as follows:-

***“If at your trial, you intend to say that you are not guilty because you were not at the place where the alleged offence occurred at the time it is alleged to have occurred, you must say so. You must also supply details of where you were and the names and addresses of any witnesses who will support you. You may do this now, or you or your advocate may supply this information in writing to this court and to the prosecution within the next fourteen days. If you do not, you may be prevented at your trial from saying that you were not present when the alleged offence occurred.”***

He responded:

***“On that day in question I have (sic) left jail on 28.8.2001. I had been jailed in connection with possession of cannabis sativa. Thereafter I went to Isebania in September 2001. (sic) Upto the date of arrest in the month of May 2002.”***

So that, the appellant gave notice to the prosecution as early as September, 2002 that he would be relying on the defence of *alibi* because he was away from Gilgil between September 2001 and May 2002. The offence was allegedly committed on 23<sup>rd</sup> October, 2001 and the appellant testified in his trial, restating the *alibi*, on 5<sup>th</sup> May, 2006. For a period of four years, the prosecution had ample time to crosscheck and discount that evidence but never bothered to do so. On the contrary, the appellant was not even cross-examined on the sworn evidence he gave at his trial.

In all the circumstances we find no basis for upholding the appellant’s conviction and we agree with learned Assistant Director of Public Prosecution, **Mr. Gumo**, who readily conceded the appeal. We allow the appeal, quash the conviction and set aside the sentence of death imposed on the appellant. The appellant shall be set at liberty unless he is otherwise lawfully held.

***Dated at Nakuru this 6<sup>th</sup> day of March, 2009***

**P. K. TUNOI**

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**JUDGE OF APPEAL**

**P. N. WAKI**

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**JUDGE OF APPEAL**

**J.W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**