



IN THE COURT OF APPEAL OF KENYA

AT ELDORET

CRIMINAL APPEAL 482 OF 2007

AMOS CHANGALWA JUMA APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Bungoma (Sergon, J.) dated 15th December, 2005

in

H.C.CR.C. NO. 5 OF 2001

JUDGMENT OF THE COURT

AMOS CHANGALWA JUMA, the appellant herein, was tried by the High Court of Kenya at Bungoma (Sergon, J.) with the aid of assessors (*as the law then provided*) on information which charged him with murder contrary to **section 203** as read with **section 204** of the Penal Code. The particulars contained in the information were that on the **16th day of December, 2000** at Sanadiki Village, Chwele Sub-Location, Chwele Location of Bungoma District within Western Province, the appellant murdered **ELIJAH NANGATA KILISWA** (*the deceased*).

The trial of the appellant in the superior court commenced on **26th February, 2004** when three prosecution witnesses testified. These were **Rogers Famba Nyongesa** (PW1), **Gideon Kiliswa Nambaka** (PW2) and **Catherine Nangata** (PW3).

Nyongesa (PW1) who was an employee of the deceased testified that on **2nd August, 2000** he witnessed the appellant who was armed with a short axe attack the deceased. This witness told the trial court that the appellant cut the deceased on the head using the axe and that before the appellant descended on the deceased he (*appellant*) had chased him (PW1) but when the deceased confronted the appellant is when the appellant turned on him (deceased). It was the testimony of Nyongesa that he heard the appellant demanding from the deceased to account to him the proceeds of sugarcane. As a result of being cut, the deceased screamed and so did Nyongesa and the screams attracted **Gideon Kiliswa Nambaka** (PW2) and **Catherine Nangata** (PW3). Nambaka was the deceased's son while Catherine was the deceased's wife. The three witnesses (PW1, PW2 and PW3) then took the deceased to Chwele Health Centre from where he was transferred to Bungoma District Hospital and later to Lugulu Mission Hospital. When his condition worsened, the deceased was taken to Moi Teaching and Referral Hospital

where he unfortunately succumbed to the injuries on 16th December, 2000.

The attack on the deceased was reported to Kimilili Police Station where **PC Joseph Njoroge (PW5)** received the report and commenced investigations. **PC Njoroge (PW5)** visited the deceased in hospital and found him in a serious condition as he had difficulties in talking. **PC Njoroge**, however, managed to record a statement from the deceased which statement was produced in evidence as **Exhibit 1**. In that statement the deceased stated inter alia:-

“I can recall very well. On the 2nd day of August, 2000 at about 7:30 p.m. I was on the way home from shamba where I had gone to look how the shamba boy namely Rodger Fwaba had work (sic). Thereafter on the way home I met the accused namely Amos Juma chasing the said shamba boy and when I asked him what was going on the named accused then turned over and hit me twice with the axe he was holding and I fell down unconscious.”

As a result of the foregoing, **PC Njoroge** preferred a charge of assault against the appellant as a holding charge pending full recovery. He (**PC Njoroge**) proceeded to arrest the appellant. It was after the deceased succumbed to the injuries sustained that a charge of murder was then preferred against him.

Chief Inspector Marko Leyamo (PW6) was the investigating officer, and he is the one who produced the postmortem report pursuant to **section 77(1)** of the *Evidence Act*.

Stephen Lumbasi Kuyi (PW4) was one of those who identified the body of the deceased on 29th December, 2000 at the *Moi Referral Hospital* for purposes of post mortem examination.

When put to his defence, the appellant chose to give unsworn statement. He denied having killed the deceased. In his defence he stated inter alia:-

“I know the deceased as a neighbour. On 2nd August, 2000, I went home to visit my father who was sick in Webuye District Hospital. I came back at 3:00 p.m. Gideon Kiliswa and Rodgers came to my home. We both took busaa. The two got drunk and started causing chaos. We fought and a neighbour who is now deceased came to separate us. The two persons then went away and I remained. I did not see the deceased that day. I deny having hit him with an axe. On 4th August, 2000 I was woken up at night by police officers and arrested for assaulting the deceased. When the deceased died a charge of murder was preferred against me.

Circumcision ceremonies were going on in the whole of Bukusu land during that time. I do not know who assaulted the deceased.”

The learned Judge heard the final submissions and then summed up the case to the remaining two assessors who in turn returned a finding of guilty as charged.

The learned Judge reserved his judgment which he delivered on 15th December, 2005, convicting the appellant as charged. He then sentenced the appellant to death. In the course of his judgment the learned Judge said:-

“The evidence clearly discloses that Elijah Nangata Kiliswa was injured on the 2nd day of August 2000 and subsequently died on the 16th day of December 2000 as a result of these injuries. I agree with the assessors that the person who killed the deceased had malice aforethought in view of the injuries inflicted. The weapon used was obviously intended to cause death or grievous harm to the deceased. Malice aforethought therefore can be deemed to have established (sic) pursuant to the provision of section 206 of the Penal Code. Such an action was unlawful. In my mind, the only issue of serious dispute is whether or not the accused person was the murderer. In that regard the evidence of Rodgers Fwamba Nyongesa (PW1) is very crucial. According to P.W.1., the accused was a person well known to him. He told this court that he had known the accused since 1997. At about 7:00 p.m. on 2nd August, 2000, he heard the voice of the accused calling his name. He said he saw him moving

towards him and he got scared. He fled and jumped over a nearby fence into the deceased's farm and shortly, he heard his employer, deceased questioning the accused as to why he was chasing him. He said he stopped about 20 metres away and saw the deceased and the accused person exchange bitter words. P.W.1. said it was not dark hence he was able to see the duo. He said he saw the accused cut the deceased on the head using the axe he had. I observed the demeanour of P.W.1. as he testified. I was impressed by his demeanor and I am convinced that he told the truth. There was no evidence that P.W.1. had malice or any grudge against the accused. The accused did not either suggest that P.W.1 had a grudge against him. According to the unsworn evidence of the accused, he had shared a drink that day with P.W.1. meaning the accused had a cordial relationship with P.W.1. I am satisfied that P.W.1. positively identified the accused at the scene of crime. I am also convinced that it was not dark. The evidence of P.W.2. corroborated the evidence of P.W.1. that the accused was armed with an axe. Though the murder weapon was not produced in evidence, I believe that P.W.1. and P.W.2. told the truth. Even if it were to be said that the accused did not possess an axe, still the position will not change because whatever the accused used to strike the deceased with, I will take it that he knew or he ought to have known that the same would cause death or grievous harm.”

The learned Judge considered the statement which the deceased had recorded and noted that the deceased had mentioned the appellant as the person who had hit him twice on the head using an axe. The learned Judge then considered the appellant's defence and rejected it. The learned Judge then concluded his judgment thus:-

“The accused in his defence argued that the deceased could have been killed by somebody else in view of the fact that it was a circumcision season in the whole of Bukusuland. I do not believe the accused. He impresses me as a person who is not trustworthy. The accused did not allude in his defence that the prosecution witnesses gave false testimonies. He did not even allude that there was bad blood between him and P.W.1., P.W.2 and P.W.3 so as I could infer malice in their testimonies.

In the end, I find that the prosecution has established its case against the accused beyond reasonable doubt.

The upshot of this trial is that, I find Amos Chagalwa Juma guilty of murder as charged. I sentence him to suffer death in the manner authorized by law.”

Being aggrieved by the foregoing, the appellant now comes to this Court by way of first and final appeal. That being so, this appellant is entitled to expect the evidence tendered in the superior court to be subjected to a fresh and exhaustive examination and have this Court's decision on that evidence. But as we do so we must bear in mind that we have not had the advantage of hearing and seeing the witness and give allowance for that (See OKENO V. R. [1972] E.A. 32 and MWANGI V. R. [2004] 2 KLR 28).

In the superior court the prosecution called a total of six witnesses. The first three witnesses (PW1, PW2, and PW3) could be described as eye-witnesses especially the deceased's employee, **Nyongesa, (PW1)** who testified that the appellant was chasing him and that when the deceased confronted the appellant is when the appellant, who was armed with an axe, turned on the deceased and cut him on the head. Those who heard the screams from the deceased and Nyongesa came to the scene immediately and found the appellant still at the scene or just walking away. We have set out briefly what various prosecution witnesses said in their respective evidence and what the appellant said in his defence. It must be remembered that these were people known to each other and even the appellant admitted as much in his unsworn statement in the superior court.

The appellant, through his advocate, has challenged the learned Judge's findings and before us was a Supplementary Memorandum of Appeal containing the following grounds of appeal:-

“1. The learned trial Judge erred in law and in fact in failing to hold that the prosecution case was poorly investigated.

2. The learned trial Judge erred in law and in fact in failing to properly address the assessors on the

issue of a dying declaration.

3. *The learned trial Judge erred in law and in fact in failing to hold that the deceased also suffered from other equally life threatening ailments at the time of death which could have equally contributed or could have been the cause to his death.*
4. *The learned trial Judge erred in law and in fact in shifting the burden of proof to the appellant.*
5. *The learned trial Judge erred in law and in fact in dismissing the appellants defence completely.*
6. *The learned trial Judge erred in law and in fact in failing to hold that there was no direct and/or circumstantial evidence linking the appellant to the offence.*
7. *The learned trial Judge erred in law and in fact in failing to appreciate that a crucial expert witness was never called to testify.”*

This is the appeal that came up for hearing before us on 24th April, 2009 when Mr. C.F. Otieno, appeared for the appellant while Mr. J.K. Chirchir, (Senior State Counsel) appeared for the State. In his submission, Mr. Otieno complained that there was no sketch plan to indicate the position where the deceased and the appellant were at the scene. We think that nothing really turns on that ground since these were people who knew each other. It is also important to remember that the deceased was rushed to hospital while the appellant disappeared from the scene. A sketch plan would have served no purpose. The next issue to be addressed by Mr. Otieno was that as the deceased was taken to various hospitals, it was not clear as to what he was suffering from. Mr. Otieno also referred to the contradictions of the evidence of prosecution witnesses.

Mr. Otieno then submitted at length on the issue of postmortem report which was produced by the investigating officer pursuant to **section 77(1)** of the *Evidence Act*. He submitted that it was not clear as to what was the main cause of death since the deceased was said to have been suffering from other ailments. Finally, Mr. Otieno submitted that the learned Judge had shifted the burden of proof on the appellant.

In opposing the appeal, Mr. Chirchir was of the view that the evidence against the appellant was overwhelming in that **PW1** was an eyewitness and that **PW2** and **PW3** came to the scene immediately. It was further submitted that even the statement by the deceased supported the evidence of **PW2** and **PW3**. As regards the cause of death, Mr. Chirchir submitted that although the deceased had other ailments, it was the injury on the head which caused his death. He further submitted that from the injuries inflicted it was clear that the appellant's intention was to kill the deceased or cause grievous harm. He, therefore, asked us to dismiss this appeal.

We have gone over the evidence and the submissions by counsel appearing and, in our view, the crucial evidence in this case was that of the three prosecution witnesses at the scene – **PW1, PW2 and PW3**. We have already dealt with their evidence and how the learned Judge treated that evidence. From the record, it is clear that this was an incident involving people who knew each other. These were indeed members of the same family apart from **PW1** who was an employee. The appellant admitted being at the scene but denied having caused any injury to the deceased. The learned Judge who had the advantage of seeing and hearing the witnesses was satisfied that the prosecution witnesses told the truth while the appellant was a person who was not trustworthy. As far as the facts are concerned, we have no reason to upset the findings of the learned Judge. As it has been stated over and again, a Court of Appeal will not normally interfere with findings of fact by the trial court unless they are based on no evidence or misapprehension of the evidence, or the trial Judge is shown demonstrably to have acted on wrong principles in reaching the decision – see **CHEMAGONG V. R. [1984] KLR 611** and **KIARIE V. R. [1984] KLR 739**.

Taking into account the evidence of **PW1, PW2** and **PW3** there can be no doubt that it was the appellant who hit the deceased on the head with an axe. From the injury sustained the deceased was

rushed to hospital and taken to various hospitals before finally being taken to Moi Teaching and Referral Hospital where he succumbed to the injuries. There was submission by Mr. Otieno to the effect that the cause of death was not clearly established. On that submission all we can say is that the deceased may have been suffering from various ailments but according to the postmortem report produced in evidence, the injury on the head was mentioned. Nobody suggested that the deceased was ailing prior to this incident. It was after being hit by an axe on the head by the appellant that he was rushed to hospital. His hospitalization was triggered by the head injury inflicted by the appellant. This was a fatal blow which subjected the deceased to being moved from one hospital to another ending up to his succumbing to the injuries. In our view the cause of the deceased's death was the head injury inflicted by the appellant and this is supported by the post mortem report.

We have considered the submissions by Mr. Otieno as supported by a few cases he cited to us but in the end have come to the conclusion that the appellant was convicted upon very clear and overwhelming evidence as submitted by Mr. Chirchir.

Before we conclude this judgment, we must say something about the manner the learned Judge dealt with the sentence. We have reproduced the concluding paragraph of the learned Judge's judgment and it is clear that the learned Judge sentenced the appellant to death in his main judgment without recording mitigating factors, if any. This was clearly improper. As we have stated previously in other judgments, after the judgment is read out and in case of a conviction, the court must take down mitigating circumstances from the accused person (*or his counsel*) before sentencing him/her. This obtains even in the cases where death penalty is mandatory. The reasons for the requirement are clear in that when the matter goes to appeal as this matter has now come before us, there are chances that the appellate Court may reduce the offence to a lesser charge such as manslaughter, grievous harm or assault. In such circumstances, mitigating factors would become relevant in assessing appropriate sentence to be awarded. Secondly, even if the matter does not come to this Court on appeal, or if it comes to this Court and the appeal is dismissed, such mitigating factors would still be required when the matter is placed before another body for clemency. Thirdly, matters such as age, pregnancy in cases of women convicts may well affect the sentence. It is thus necessary that mitigating factors be recorded even in cases of mandatory death sentence.

In ***JOHN MUOKI MBATHA V. R.*** – Criminal Appeal No. 72 of 2002 (unreported) this Court said:-

“As we have stated over and over again when considering sentences in respect of murder cases, the sentences should be reserved and pronounced only after mitigating factors are known. This is important because, in mitigation, matters such as age, and pregnancy in cases of women convicts may affect the sentence even in cases where death sentence is mandatory. In our view, no sentence should be made part of the main judgment. Sentencing should be reserved and be pronounced only after the court receives mitigating circumstances if any are offered.”

Apart from the error of sentencing the appellant in the main judgment without giving him or his advocate opportunity to state mitigating factors, we find no fault in the manner the learned Judge reached his decision in convicting the appellant.

For the foregoing reasons, we find no merit in this appeal and we order that the same be and is hereby dismissed. Those shall be our orders.

Dated and delivered at ELDORET this 29th day of May, 2009.

E.O. O’KUBASU

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR