



IN THE COURT OF APPEAL OF KENYA

AT ELDORET

CRIMINAL APPEAL 483 OF 2007

SAMSON WAFULA WANASUNIAAPPELLANT

AND

REPUBLICRESPONDENT

(An appeal from the judgment of the High Court of Kenya at Bungoma (Sergon, J.) dated 30th January, 2006

in

H.C.CR.C. NO. 6 OF 1999)

JUDGMENT OF THE COURT

The appellant, *Samson Wafula Wanasuna*, was convicted by the superior court (Sergon, J.) on one count of murder contrary to section 203 as read with section 204 of the Penal Code. The Information on murder was surprisingly amended on 30th June, 2004, more than six years after the Attorney General had filed the first Information on 19th May, 1999, after the appellant’s arrest on 21st January, 1998. The learned Judge was understandably livid when the prosecution sought an adjournment to substitute the Information and he stated:

“I have perused the record. It is clear that the accused was arrested on 21.1.98 and the current charge sheet was drawn and signed on 19.5.99. In shock the accused has been in custody for a period of 6 ½ years. The charge sheet sought to be substituted has been in existence for a period of 5 years. The evidence of 5 witnesses had been taken in support of the defective charge before the Hon. Mr. Justice Mitey before he was retired.

This matter was declared a mistrial on 21.1.2004 and the same proceeded on 26.3.2004 where two witnesses testified for the second time. It should be noted that the prosecution were in possession of the information which they knew would be presented to support that case. It took them over 6 ½ years to detect the mistake. If the application is allowed it means the matter will start de novo. This will make the two witnesses who have testified on the previous occasions to be summoned to testify afresh. I think this is a situation which this court cannot condone. It has always been said that justice delayed is justice denied. The accused person has waited for long to know his fate. I think the only way for justice to be seen to have been done by this court is to reject the application for an adjournment. The prosecution have other ways of wiggling out of the matter without

causing much ripples. The application for adjournment is rejected. The matter should proceed for hearing as scheduled.”

The substitution of the Information was nevertheless allowed and the appellant was tried on the following two counts:

COUNT I:

SAMSON WAFULA WANASUNIA: On the 18th day of January, 1998 at Turukuyi village in Bungoma District within Western Province murdered STEPHEN WAMUCHEBULE.

COUNT II:

SAMSON WAFULA WANASUNIA: On the 18th day of January, 1998 at Turukuyi village in Bungoma District within Western Province murdered MARGARET NAFULA.

Upon his trial which was conducted with the aid of assessors as by law required at the time, the assessors returned a unanimous opinion that the appellant was guilty on both counts. The learned Judge however, found and gave reasons for it, that the second count was not proved and acquitted the appellant. The appellant was however convicted on the first count and was sentenced to suffer death as by law provided. He now comes before us on this first appeal to challenge his conviction. As such, we are duty bound to re-evaluate and assess the evidence on record afresh and reach our own conclusions in the matter – see **Okeno v Republic [1972] EA 32.**

The prosecution evidence came through seven witnesses but only two testified as eye witnesses to the incident. That was **Catherine Naliaka** (PW5) (**Catherine**) and **Beatrice Amukobe Amalemba** (PW6) (**Beatrice**). Catherine was the 12 year-old daughter of **Stephen Wamuchebule** (“deceased”). She was also the cousin of the appellant because the appellant was the nephew of the deceased. On the 18th January, 1998, she was perched on top of a mango tree within her father’s land when three other children came. The children were the sons of the appellant whom he had sent to harvest mangoes from the same mango tree. They were Juma, aged 13, Fred aged 12, and Patrick aged 17. Catherine told her father, the deceased, what the children wanted and they were given a few mangoes and returned home. Shortly thereafter the appellant appeared from his home which, according to Catherine, was about 200 metres away holding a panga and demanding to know why the deceased had refused to allow the children to harvest mangoes. He scolded the deceased and attempted to cut the mango tree down. Then the appellant returned home and came back with an axe which he used to hit the deceased. Catherine ran away screaming to another village nearby. Catherine also testified in cross-examination that her father and the appellant were quarrelling over land. The appellant was demanding that her parents move out of the land they were occupying. The dispute, according to her, was long standing. She did not witness any attack on the appellant by the deceased.

The other eye witness, Beatrice, was the daughter-in-law of the deceased, married to his son. Since her marriage in 1996 she had come to know about a long standing land dispute between the deceased and the appellant. On the day in question she was passing by the appellant’s home when she saw him heading towards the deceased’s home holding an axe. Shortly after, she saw the appellant hit the deceased with the axe. According to her, the deceased’s home was 100 metres from her own house. She started screaming and attracted other members of the public.

The Assistant Chief of the area, **John Nyongesa Singoro** (PW2) (**Asst. Chief Singoro**) was among the first people to arrive at the scene and found the deceased’s body under a mango tree but did not find the appellant. He found many other people and a burnt out house belonging to the appellant. He testified that he retrieved the alleged murder weapon, the axe, but he did not say what he did with it. It was never produced in evidence! Although the Assistant Chief’s home is barely 1km from the homes of the deceased and the appellant, Asst. Chief Singoro had never heard of any land dispute between the two. Shown a land title deed confirming that the land was registered in the name of the appellant and his two brothers, the Assist Chief said he did not know the land occupied by the appellant and his two brothers.

The Chief of the area was however more categorical. He was **Senior Chief Eliud Naulikha Wekesa** (PW1) and his home was 3kms away from the deceased's. He was aware of the land dispute between the members of the family, especially between the appellant and the deceased, where each of them accused the other of trespass. The chief had unsuccessfully tried to have the dispute settled by village elders and it was then referred to the Land Disputes Tribunal. Shown the title documents indicating that the land was registered in the name of the appellant and his two brothers, the chief conceded that the parcel of land was not registered in the deceased's name but asserted that it was the appellant who found the deceased having settled on the land but the appellant built his house on it. The house was burned out when the chief arrived at the scene.

The body of the deceased was collected from the scene by **Senior Sergeant John Mureithi** (PW3) (**SSgt. Mureithi**) who received the report of the incident at Bungoma Police Station. He saw a deep cut on the head of the deceased and later organized for a postmortem. The investigation of the crime was carried out by one **Chief Inspector Titus Karori** but he was not called to testify at the hearing. SSgt. Mureithi confirmed that he did not carry out any independent investigation of his own; and so he did not know the cause of the fight between the appellant and the deceased.

According to the postmortem report produced in evidence by **Dr. Ataku** (PW7) of Bungoma District Hospital, the deceased was 74 years old and had a compound fracture of the head. A piece of bone was missing and the brain was protruding out of the skull. He formed the opinion that the cause of death was cardio pulmonary arrest secondary due to head injury. He added in cross-examination that "*the injury was not repeated. It was only one inflicted on the head.*" Dr. Ataku also produced a P3 form filled by one Dr. Juma who had examined the appellant to determine his mental fitness. The appellant was 60 years old and was mentally fit.

When he was put on his defence, the appellant testified that he had no intention of killing the deceased who was his uncle. On the day in question he had gone in the morning to work on his farm in **LR. No. West Bukusu/North Myanga/367**, for which he held a Title Deed and produced it as an exhibit. Then he saw the deceased and his children burning his house, toilet and store. The deceased started fighting him and the appellant tried to run away. In the process of disengaging himself, the jembe he was holding hit the deceased on the head. He ran away for safety at his brother's house in Bungoma where he was arrested three days later on 21st January, 1998.

In convicting the appellant for the offence of murder, the learned Judge stated as follows: -

"The evidence of PW5 and PW6 who were eye witnesses were consistent. In my view they were credible witnesses who told the whole truth. The duo saw the accused assault Stephen Wamuchebule (deceased) with an axe. The evidence of PW7 in form of a postmortem report dated 24.1.1998 corroborated the evidence of PW5 and PW6. The murder weapon was not produced in evidence but in my view that will not make much difference because the object the accused used caused the injuries noted in the postmortem report. The evidence of PW1 and PW6 shows that there was a long standing land dispute between Stephen Wamuchebule (deceased) and the accused. I am satisfied that malice aforethought was established by the evidence of PW1 and PW6. I agree with the opinion of the assessors that malice aforethought was manifested in the land dispute. Even if I was to be found to be wrong over the issue, my view will remain the same. I am of the view that whatever weapon the accused used to assault Stephen Wamuchebule (deceased) he ought to have known that the same would cause death or grievous harm to the deceased."

In dismissing the defence of the appellant, he stated: -

"The accused has said that he accidentally hit the deceased while he was disengaging himself while they were fighting. The postmortem report does not support the defendant's defence. The deceased suffered a compound fracture and had his brain protruding out of his skull. This cannot be said to have been caused by an accidental fall of a jembe of people who were wrestling. I find the accused's defence as a make up. I see no merit in it."

The appellant put forward 11 grounds of appeal through a supplementary memorandum of appeal filed by learned counsel for him Mrs. Grace Sitati–Kimathi. Mrs. Sitati-Kimathi abandoned 11 other grounds stated by the appellant in a memorandum of appeal drawn in person. In arguing the appeal however, she condensed the grounds in two tranches; firstly to challenge the finding that malice aforethought was established, and secondly, on self defence.

On the first ground, counsel argued that there was no cogent evidence to establish a land dispute between the appellant and the deceased which could have led to any plan by the appellant to eliminate the deceased. She attacked the lack of investigation in the case to clarify the various allegations put forward by the prosecution and left unverified, including the mysterious murder weapon. In her view, it was erroneous for the learned Judge simply to remark that the weapon which caused death did not matter. There were serious lapses in investigation of the case which on the authority of **Mutua Mutisya v Republic [2008] eKLR**, should lead to rejection of the prosecution evidence as flawed. On the totality of the evidence on record, she submitted, no malice aforethought, as defined under **section 206** of the Penal Code, was established. She also cited **Mohamed Abdalla Mohammed v Republic [2008] eKLR** and **Bukenya & others vs. Uganda [1972] EA 549** to buttress her arguments.

As for the issue of self defence Mrs. Sitati-Kimathi relied on the principle laid by the **Privy Council in Palmer v Reginam [1971] All ER 1077** that:

“where the evidence is sufficient to raise the issue of self-defence, that defence will only fail if the prosecution shows beyond doubt that what the accused did was not by way of self-defence.”

In her submission the prosecution did not discharge that burden. There were two versions of the facts, one alleging that an axe was used several times to hack the deceased to death, the other an admission that the appellant hit the deceased without the intention of killing but in the course of a fight. Instead of critically examining the two versions, the learned Judge dismissed the defence by erroneously finding that the jembe held by the appellant did not fall accidentally. There was nothing like “*accidental fall*” in the evidence on record, and the direction to the assessors in that regard was erroneous. Learned counsel also questioned the lack of any finding on the fact stated by the prosecution and the appellant himself that the appellant’s house was burned. A finding on that issue would have established who the aggressor was but none was made. She further submitted that the evidence that the deceased was hit severally was negated by other prosecution evidence that he was only hit once, which accorded with the appellant’s assertion of events. Finally, counsel pointed out that the only eye witnesses who were relied on were the two children of the deceased but the learned Judge did not caution himself about the danger of total reliance on their evidence.

For his part, learned Senior Principal State Counsel Mr. Omutelema agreed with the trial court that malice aforethought was proved. There was no doubt that the deceased and the appellant were actively involved in a land dispute and so malice aforethought was correctly inferred. Secondly the injuries caused on the deceased were so grave that malice aforethought could be inferred even without proof of the land dispute. The lapses noted in the prosecution case, in his view, were inconsequential and did not dent the prosecution case. As for self-defence, the appellant’s evidence was rightly rejected when the prosecution witnesses were believed and the learned Judge cannot therefore be faulted on his findings.

We have carefully re-examined the evidence afresh and also considered the grounds of appeal as well as the submissions of both counsel. In the end we think, with respect, that there were reasonable doubts which negate *mens rea* on the part of the appellant, the benefit of which ought to have enured to him. The most glaring weakness in the case is the lackadaisical manner in which it was investigated. It was no use advancing the testimony of Assistant Chief Sangoro that he retrieved the murder weapon when he did not hand it over to the investigating officer or if he did, the weapon was not produced in evidence for reasons known to the prosecution. The investigating officer himself was nowhere to be found and there was no explanation for failure to call him. The confession by the only police officer to testify in the matter, PW3, that he knew nothing about the cause of the fight and that he did not carry out any investigations is quite telling about the seriousness with which the offence was handled, if any. Those omissions in our view would give credence to the appellant’s defence that he may well have been fighting with the deceased

when he struck the deceased with a jembe he was holding. The postmortem report is instructive that there was only one injury on the head, and though serious in nature, there was no assignment of any kind of weapon that caused the injury. The prosecution witness, in particular PW1, PW5 and PW6, also confirm that there was a long running land dispute between the appellant and his uncle, the deceased, and PW5 at least said there was a quarrel over land on the day. There was therefore nothing implausible about the appellant's version of events, and in our view, the short shrift given to the appellant's defence was erroneous. The attack was within the shamba disputed by both parties, one of whom, the appellant, has a title deed to show for it. According to 12 year-old Catherine who was closest to the events of the day, the immediate quarrel was over the mango tree. If we believe the distance given by Catherine, it would mean that Beatrice (PW6) was 200 metres away when she witnessed the events and therefore her evidence would not be as credible and the learned trial Judge believed.

From what we have said so far, it is clear that we do not discount the appellant's story that there was a fight within the disputed land which resulted in the death of the deceased. We do not however accept that the appellant was all blameless and acted in self defence. If he was he used excessive force to repulse the attack and must take responsibility for it. There is no evidence that the deceased was armed when the fight began. The appellant caused the death of the deceased unlawfully. Accordingly we quash the conviction for the offence of murder and substitute therefor a conviction for manslaughter under **section 202** as read with **section 205** of the Penal Code.

The learned trial Judge proceeded to sentence the appellant to death in the body of the judgment. As this court has stated, many a times, that was wrong – see **John Muoki Mbatha v Republic Cr. App. No. 72/2007 (ur)**. The sentence ought to have been considered after recording any mitigating factors or circumstances even where the law provides for the death sentence. That way, difficulties which may otherwise arise in considering alternative sentence in the event of a successful appeal or for clemency purposes, would be obviated. We trust this procedure will be complied with by trial courts.

Having said that we consider that the appropriate sentence, which we now impose upon the appellant in this case is 18 years imprisonment. The sentence shall run with effect from the date of his conviction by the trial court, that is to say, 30th January, 2006. To that extent the appeal is allowed.

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

E.O. O'KUBASU

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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