IN THE COURT OF APPEAL OF KENYA

AT ELDORET

CRIMINAL APPEAL 291 OF 2008

WILLIAM CHEMASE SITIENEI ……..... APPELLANT

AND

REPUBLIC ……...……RESPONDENT

(An appeal from the conviction and sentence of the High Court of Kenya at Eldoret (Ibrahim, J) dated 19th November, 2007

in

H. C. CR. C. NO. 3 of 2000)

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JUDGMENT OF THE COURT

The appellant, **William Chemase Sitienei**, was charged with the offence of murder, contrary to **section 203** as read with **section 204** of the Penal code. The particulars of the offence were that:

"*On the 14th day of June, 1999, at Kaoni Village, Plateau Sub-Location within Uasin Gishu District of the Rift Valley Province murdered Daniel Kipketer Bartilol.*"

He pleaded not guilty, and his trial began with the aid of assessors initially before Dulu, J, and later upon the latter's transfer from Eldoret, before Ibrahim, J.

The trial began de novo before Ibrahim, J on 5th June, 2006 and concluded on 2nd August, 2007. The learned Judge heard eleven witnesses for the prosecution, while the appellant gave a sworn statement, and called no witnesses. In the end, the learned Judge found the appellant guilty as charged. He was convicted and sentenced to death. The assessors also returned an opinion that the appellant was guilty of murder after the learned Judge of the superior court summarized the entire case to them. The appellant was aggrieved by that decision and has preferred this appeal. The original memorandum of appeal was filed by the appellant in person. However, the appeal was taken over by Mrs S. M. W. Were, Advocate who filed and relied on the supplementary memorandum of appeal filed on 19th March, 2009. The grounds relied upon by the appellant are as follows:

(i) The learned judge failed to hold that the evidence tendered by the state witnesses was inconsistent.

(ii) The learned judge failed to hold that the state witnesses were not credible witnesses.

(iii) The learned judge failed to consider the consequences of uncalled state witnesses.

(iv) The learned judge failed to consider the consequences of uncorroborated evidence of the state witnesses.

(v) The learned judge failed to find that the state had not called any eye witness and the consequences thereof.

In her arguments before us, Mrs Were outlined the inconsistencies and contradictions in evidence, leading, in her submission, to the conclusion that the state witnesses were not credible. She cited the inconsistency between PW 6 (Eddy Chepkemboi Bartilol) and PW 5 (Gladys Cheruto Kibogy) regarding their respective accounts of how the deceased narrated the incident of "stabbing". She further cited the difference in the testimonies of PW 8 (Richard Kiprotich Lemiso) and PW 3 (Phillip Malakwen) as to where the alleged murder weapon was found – PW 8 said it was found in the bedroom, while PW 3 said it was found "at the back of a cupboard"; and finally that PW 7 (Jackson Lemisoi) said the sword (the alleged murder weapon) when found had blood on its tip, while the investigating officer (PW 11) had found no blood on the sword. Finally, she argued that not calling the officers who conducted the search at the appellant's house was fatal to the prosecution case. Mr Omutelema, the learned Senior Principal State Counsel, on the other hand, was of the view that the inconsistencies in evidence cited by the defence were not substantive, in the face of strong circumstantial evidence before the court.

As this is a first appeal, the law requires us to revisit the evidence afresh and to analyze it, evaluate it, and come to our own conclusion but always keeping in mind that the trial judge had the benefit of observing and hearing the witnesses and giving allowance for that (see *Okeno vs Republic (1972) E A 32)*. Having done that and having considered the above submissions together with the record, we find the facts of the case as follows.

The appellant had a brother called Joseph Kipchumba Chemase ("Joseph"), who died in 1996. Joseph had a wife called Grace Kipchumba Chemase ("Grace"). After Joseph passed away, the appellant wanted Grace to be his wife. However, she refused to marry him, and did not entertain his advances. He was persistent, and she complained to his parents. She liked another man, Daniel Kipketer Bartilol ("Daniel") the deceased. The appellant did not approve of his relationship, and was jealous of the deceased. On the evening of the material day, the appellant met Grace Jeptoo (PW 4) at a busaa drinking place owned by one Mutiso. He asked her who were drinking at Mutiso's place, and whether Daniel was there. She confirmed Daniel's presence, and said Daniel was drinking with another old man. He then asked her to go to Mutiso's house and check if Grace was there. She did so, and confirmed that Grace was also there, although inside the house, while the other two men were drinking outside the house. Soon, thereafter, at about 7 pm on the same evening, Daniel was found outside PW 5, Gladys Cheruto Kibogy's house bleeding and with stab wounds in the stomach, chest, hands and back. He told PW 5 that he had been stabbed by the appellant. On hearing screams coming from the direction of Daniel's house, PW 6, a brother of Daniel, rushed to where Daniel was, and was also told by Daniel that the appellant had stabbed him. Similarly, another of Daniel's brother, PW 7 came over, and Daniel repeated to him the same story. Daniel was taken to hospital, and finally passed away in the hospital on 21st June, 1999. His post-mortem was done on 25th June, 1999 by Dr John Cheruiyot Kibosa (PW 10) who described the cause of death as "intra-abdominal sepsis due to penetrating abdominal injury", caused by a sharp object. PW 3, PW 7 and PW 8 were among the group of officers who apprehended the appellant at the latter's house. A search was done of the house, and the alleged murder weapon, the sword was found. It was so identified in court by several witnesses.

In finding the appellant guilty of the offence of murder contrary to section 203 as read with section 204 of the Penal Code, the learned Judge of the superior court, stated:

"From all the foregoing direct and circumstantial evidence, I do find that the accused attacked the deceased using the Somali sword and the deceased sustained the injuries to his chest, lungs, head and stomach. The doctor confirmed that the deceased died from injuries caused by a sharp object. The cause of death was intra-abdominal injury/sepsis due to penetrating abdominal injuries.

The deceased was stabbed on 14th June, 1999. I do hold and find that he died from the wounds inflicted by the accused using the Somali sword.

I find that the accused attacked the deceased. He had malice aforethought as he had spied on the deceased and planned the attack. He had a motive i.e. he was jealous of the deceased as his brother's widow preferred the deceased to the accused. The intention is proved."

We find that the learned judge was fully justified in coming to that conclusion.

The evidence of PW 6, PW 7 and PW 8 is strong, credible and corroborated. Immediately after the attack, the deceased told each of those three witnesses in succession, that it was the appellant who stabbed him with a sword; that sword, with blood tip, was found in the appellant's house – it matters not whether it was found in the bedroom or behind the cupboard in another room. The fact is that it was found in the house, and it was identified by several witnesses as the weapon that matched the description given by the deceased. The appellant had a motive and an opportunity. He was jealous of the deceased who had won the heart of the woman he, the appellant wanted, and he had spied on the deceased and the woman (Grace) up until the time the deceased met his death. We are in agreement with the learned judge's rejection of the defence theory that the appellant was "framed" by the prosecution, the arresting officers and the family of the deceased. We see no evidence of that, nor do we find that the contradictions or inconsistencies in evidence outlined by the learned counsel for the appellant are significant enough to affect our judgment in this case. Equally, we do not believe that calling any more witnesses would have added more value to the prosecution case. All in all we concur with the finding of facts by the superior court, and as we have said on many occasions in the past, the Court of Appeal will not normally interfere with findings of facts 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 vs Republic (1984) KLR 611 and Kiarie vs Republic (1984) KLR 739*.

We have considered the submissions by Mrs Were, learned counsel for the appellant, and have come to the conclusion that the appellant's conviction was safe, and that it was based upon very clear and overwhelming evidence.

Before we conclude, we would wish to note about the manner in which the learned Judge dealt with the sentence. He sentenced the appellant to death in his main judgment without recording the mitigating factors, if any. This was clearly improper. As we have stated previously, 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, 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 vs Republic – 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

P. N. WAKI

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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