



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT MOMBASA**

Criminal Appeal 445 of 2007

GEORGE NGANGA MAINA..... 1ST APPELLANT

RAPHAEL GURU MAINA 2ND APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from conviction and sentence of the High Court of Kenya at

Malindi (Ouko J.) dated 4th July 2007 in H.C.CR.C. NO. 6 OF 2006

JUDGMENT OF THE COURT

The genesis of this appeal is an information filed by the Attorney General in which four people were charged with murder contrary to **Section 203** as read with **Section 204** of the Penal Code. The particulars of the offence in that information were as follows:

“1. HILLARY MAINA NJUGUNA, 2. GEORGE MAINA ALIAS ALLAN 3. RAPHAEL GUGU MAINA 4. JOHN GUCHU WANYOIKE: On the 5th day of December, 2004 at about 6.00 p.m. at Umoja village within Lamu District of the Coast Province jointly murdered JOHN MAINA GACHERU.”

The trial of the four people commenced before the High Court at Malindi (Ouko J.) on 26th June, 2006 with the aid of assessors (as the law then provided). At the close of the prosecution case, the 4th accused (**John Guchu Wanyoike**) was acquitted for lack of evidence and hence the first three accused persons were put to their defence.

The summary of the prosecution case as deduced from the six prosecution witnesses was that on 5th December, 2004 the deceased, **John Maina Gacheru** went to the home of 1st accused **Hillary Maina Njuguna**, broke into the house and stole some maize which he carried away on a bicycle. Njuguna and **Peter Ngugi Kamau** (PW1) saw another person in a nearby thicket carrying a sack of maize but this person dropped the sack of maize on seeing the two (Njuguna and Kamau). Njuguna asked Kamau (PW1) to keep an eye on the sack that had been dropped while he (Njuguna) followed the deceased. Kamau then decided to follow Njuguna and when he caught up with him he found Njuguna having arrested the deceased who was tied up with a rope and the bicycle together with the sack of maize next to him. At the scene there were three other people who included **John Guchu Wanyoike** (who was the 4th

accused). As Njuguna went to report to the police, the deceased was taken back to the place where a sack of maize had been dropped. It was at this stage that **George Nganga Maina** (2nd accused) and Raphael Guru Maina (3rd accused) came to the scene. These two, 2nd and 3rd accused are the 1st and 2nd appellants respectively in this appeal. It was the evidence of Kamau (PW1) that the 1st appellant was very angry with the deceased and that the two appellants then attacked the deceased and eventually took him away.

It was the evidence of James Wainaina Mwaura (PW2) that on the 5th December, 2004 at about 1.00 p.m. he was at his shop when Maina Njuguna (1st accused) called him and informed him that he (Njuguna) had caught a thief who had stolen his maize. Njuguna asked Mwaura to keep the maize and the bicycle in his shop. The alleged thief was the deceased. In the course of his evidence Mwaura testified as follows:

“I came out and saw the deceased, 2nd and 3rd accused and others following. The 2nd and 3rd accused were holding the deceased and were carrying sticks. 2nd and 3rd accused without any reasons started beating me with their fists and sticks. I explained to them that it is their father who had left the sack with me. They left with the deceased. In the evening at about 6.00 p.m. the deceased was brought back in a bad state. He could not support himself. The 2nd accused was there with him. He lay on the ground. 2nd accused left to go and call the police. Later the police came and collected the deceased as he had died”.

In his evidence Anthony Gitonga Wangui (PW3) told the trial court that on the material day at about 2.00 p.m. he was on his way home when he saw a crowd near the home of Njuguna (1st accused) where there was a person who was alleged to have stolen maize. The alleged thief was the deceased. Wangui (PW3) did not witness anything else except that the following day he learnt that the deceased had died.

Celina Wanjiru Maina (PW4) was the wife of the deceased who learnt that her husband had been beaten because he had been caught stealing maize.

Dr. Gideon Mutua (PW5) testified that he conducted postmortem examination on the body of the deceased. According to Dr. Mutua death of the deceased was caused by *“massive haemorrhage from the brain, spleen due to trauma”*.

Cpl. Lee Lemeraria (PW6) received the report of the deceased’s death and commenced investigations which led to the arrest of the two appellants and their two co-accused persons who were then jointly charged with murder.

When put to their defence, the appellants chose to give unsworn statements. In his unsworn statement, the 1st appellant **George Nganga Maina** stated that on the material day he was on his way home at about 4.00 p.m. when he saw a crowd shouting *“ni mwizi”* outside his brother’s home. The crowd was furious and wanted to burn the deceased. The 1st appellant tried to intervene but the crowd would not listen to him. He therefore left the scene and went home to look after his goats. Later he went to the scene and was informed that the deceased had died. Later the police arrested him but released him on bond. He was subsequently charged with murder.

The 2nd appellant, **Raphael Guru Maina** stated that on 5th December, 2004 he went to church where he remained until 2.00 p.m. He visited a man who wanted to buy cashew nuts but did not find him. He then went to the shopping centre. On his way home, he saw a crowd which was highly charged and it wanted to burn the deceased who was pleading with them. The 2nd appellant then went to his house from where he could hear people urging that the deceased be burnt. He (2nd appellant) however remained with his goats until it was dark. He was later informed that the deceased had died.

The learned Judge summed up the evidence and the law to the assessors. The 1st and 2nd assessors

were of the view that the two appellants were guilty as charged while the 3rd assessor was of the view that they were not guilty. The learned Judge considered the evidence and the submissions made by counsel appearing and came to the conclusion that the two appellants were guilty as charged. In the course of his judgment, delivered at Malindi on 4th July, 2007 the learned Judge said:-

“The chain of events were not broken from the point the two accused persons took hold of the deceased to the time he was returned before he finally died. The two accused persons’ explanation that they only watched as the mob attacked the deceased cannot be credible. I am satisfied that they were annoyed on finding that the deceased, who was described as a common village thief, had stolen from their father. They set out with a common intention of teaching him a lesson and in the process used excess (sic) and unjustifiable force to extract information from the deceased as to where he may have hidden some more stolen maize. The type of injuries identified by the doctor are consistent with the hitting with fists and sticks.”

Having so stated, the learned Judge convicted the two appellants and sentenced each of them to suffer death as provided by law.

Being aggrieved by the foregoing conviction and sentence, the appellants, through their counsel, filed an appeal and in a supplementary memorandum of appeal set out the following six grounds:

- “1. That the learned trial Judge erred in law and fact in convicting the Appellants against the weight of evidence.**
- 2. That the learned trial Judge erred in law and fact in failing to find that there was no proof of malice afterthought on the part of the Appellants.**
- 3. That the learned trial Judge erred in law and fact in finding that the appellants intended to cause grievous harm to the deceased.**
- 4. That the learned trial Judge erred in law and fact in failing to adequately consider the evidence of PW1 and PW2.**
- 5. That the learned trial Judge erred in law and fact in dismissing the evidence that the deceased was a victim of “Mob Justice.”**
- 6. That the learned trial Judge erred in law in failing to pass sentence after the conviction.”**

That is the appeal that came up for hearing before us on 20th July, 2009 when Mr. N. Gakuhi appeared for both appellants while Mr. J. M. Ondari (Assistant Deputy Public Prosecutor) appeared for the State.

In his submissions, Mr. Gakuhi started by stating that he was abandoning the last ground in the supplementary memorandum of appeal. Although Mr. Gakuhi started as if he would argue the grounds seriatim he actually took a global view of the matter and argued them together. It was his submission that the trial Judge convicted the appellants against the weight of evidence as there were only two witnesses who testified how the deceased met his death. He pointed out that there was evidence that the two appellants were angry but that they did not beat the deceased. He further submitted that the learned Judge erred in dismissing the contention that, this was a case of mob justice. He contended that each appellant gave an explanation on how he tried to help the deceased but to no avail. Finally, Mr. Gakuhi submitted that there was no evidence of malice aforethought since the appellants only slapped the deceased. He therefore urged us to allow the appeal by quashing the conviction and setting aside the death sentence passed on the appellants.

On his part, Mr. Ondari supported both the conviction and the sentence. In his submissions, Mr. Ondari contended that it was the appellants who took the deceased away, beat him up only to bring him

back to the shop badly injured. Mr. Ondari, further submitted that the appellants did not give any explanation and that whatever explanation they gave was properly rejected. On the issue of malice aforethought, Mr. Ondari pointed out that the appellants were armed with sticks and that the deceased received injuries which were classified as grievous harm leading to his death. For all these reasons, we were asked to dismiss this appeal.

This being a first appeal, it is our duty to subject the evidence adduced at the trial to a fresh and exhaustive scrutiny. It is for that reason that we have set out the summary of both the prosecution evidence and the unsworn statements by the appellants. In **Kinyua vs. R** [2003] KLR 301 at pages 303 – 304 this Court said:

“This being the first (and last) appeal it is our duty to subject the evidence adduced to a fresh and exhaustive scrutiny so that we can draw our own conclusions on the conflicting evidence. In Okeno v R [1972] EA the predecessor of this Court made the following observation as regards the function of the first Appellate Court:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v R [1957] EA 336) and to the Appellate Court’s own decision on the evidence. The first Appellate Court must itself weigh conflicting evidence and draw its own conclusions. (Shantilel M Ruwal v R [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and draw its own conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses, see Peters v Sunday Post [1958] EA 424”.

We have been urged to allow this appeal on the ground that the conviction was against the weight of evidence. Our perusal of the evidence discloses that the witnesses, the appellants and the deceased were people who knew each other well and that this incident was in broad daylight. It was the prosecution case that the appellants being aggrieved by the fact that the deceased had been caught stealing maize, set upon him with sticks, took him away and returned him to the shop when the deceased was actually dying. In the course of his evidence in chief Kamau (PW1) stated, *inter alia*:

“Allan – 2nd accused identified appeared. He was very angry. Raphael – 3rd accused also came and hit him with his fist. I urged them not to beat him. They heeded and stopped. They took him away. They were 2nd, 3rd and Safari (not in court) took him away”.

We have reproduced the evidence of Mwaura (PW2) elsewhere in this judgment to the effect that the two appellants left with the deceased and that when they brought him back the deceased was in a bad state. There is, therefore, the evidence of the two witnesses (PW1 and PW2) to the effect that they saw the two appellants assault the deceased, take him away and when they brought him back he was in bad shape and he eventually collapsed and died. In the course of his judgment, the learned Judge makes the following findings:

“Mwaura also saw the two accused persons shortly after and was categorical that when he saw the deceased being held by the 2nd and 3rd accused persons, the former was in good health. That the 2nd and 3rd accused persons were carrying sticks with which they attacked Mwaura. Mwaura also confirmed that the two accused persons took the deceased with them and that when they returned, the deceased was very weak and eventually passed away. This evidence supports materially the testimony of Peter”.

In view of the foregoing, we are satisfied that there was ample evidence to the effect that the two appellants were seen assaulting the deceased, took him away and on returning him the deceased was already in bad shape. The applicants’ position was that they had nothing to do with the death of the deceased and that they indeed tried to stop the mob from burning him but to no avail. If the appellants were, indeed, interested in saving the deceased from the mob, they could have taken him to the police

station. Each appellant gave unsworn statement in a bid to explain where each of them was in relation to the incident. The learned trial Judge considered their explanation but rejected the same. On our re-evaluation of the evidence on record and the submissions made before us, we are satisfied that the learned Judge was entitled to reject the appellants' explanation. How the deceased got the fatal wounds was a matter within the appellants' personal knowledge. They had the evidential burden of explaining it. The explanation they gave was properly rejected.

There was the issue of mob justice which Mr. Gakuhi contended was not considered by the learned Judge and/or rejected.

The learned Judge considered the issue of mob justice and in the course of his judgment said, *inter alia*:

“I have already stated that the issue of “mob justice” was introduced by the defence. Yet the other witnesses saw a crowd only following the 2nd and 3rd accused persons as they led the deceased away. There is no evidence from them that the mob attacked the deceased. The evidence that is consistent is that the two accused persons beat up the deceased. They intended to cause him grievous harm from the nature of injuries they inflicted on him.”

With respect, we agree with the foregoing.

On the issue of malice aforethought, we refer to the evidence of the two witnesses (PW1 and PW2) who saw the appellants assaulting the deceased and the postmortem examination report and it is our conclusion that the appellants inflicted serious injuries on the deceased hence there can be no doubt that they intended to cause grievous harm or even to kill.

Section 206 of the Penal Code provides:

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances –

- (a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;**
- (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused by or not, or by a wish that it may not be caused;**
- (c) an intent to commit a felony;**
- (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”**

In view of the foregoing, there can be no doubt that when the appellants set upon the deceased and assaulted him on the account of being a thief, they intended to either cause grievous harm to the deceased or actually kill him.

For the forgoing reasons, we are satisfied that the appellants were convicted on very sound evidence and the sentence imposed was a lawful sentence. Accordingly, we order that this appeal be and is hereby dismissed in its entirety.

Dated and delivered at Mombasa this 24th day of July, 2009.

S. E. O. BOSIRE

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JUDGE OF APPEAL

E. O. O’KUBASU

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JUDGE OF APPEAL

J. G. NYAMU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR