



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

Criminal Appeal 119 of 2007

GIDEON MWANIKI KITHOMUAPPELLANT

AND

REPUBLICRESPONDENT

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

Nairobi (Muga Apondi, J.) dated 29th May, 2007

in

H.C.Cr. C. No. 115 of 2005)

JUDGMENT OF THE COURT

On an information dated 1st December, 2005, *Gideon Mwaniki Kithomu*, the appellant was charged with the offence of murder contrary to *section 203* as read with *section 204* of the Penal Code. The facts of the offence were that on 8th November, 2005 at Kware area Ongata Rongai in Kajiado District within Rift Valley Province he murdered *Stanley Mutiso Kioko*, the deceased. The State called a total of eight witnesses. At the end of the evidence the superior court (*Muga Apondi, J.*) summed up the case to the assessors who returned a verdict of not guilty for the appellant for the murder charge. However, when the learned Judge wrote and delivered his judgment and reviewed the evidence, he came to the conclusion that the appellant was guilty of murder, thus departing from the opinion of the assessors. He convicted the appellant and sentenced him to death, the only sentence prescribed by law for that offence. The appellant was aggrieved by this decision and has appealed to this Court as it is his right so to do. Being a first appeal it is our duty to reconsider and reevaluate the evidence ourselves in order to draw our own independent conclusion in deciding whether the judgment of the trial court should be upheld; *Okeno v. Republic* [1972] E.A. 32; see also *Pandya v. R* [1957] E.A. 336.

The facts leading to the appellant's arrest were that the deceased was working with *Stephen Mbucho Mukuria (Mukuria)* a shoe shiner on 8th November, 2005 at Ongata Rongai at around 11.00 a.m. when three men came to where the deceased was and talked to them. As he escorted them to go away, about eight metres from where Mukuria was he saw the appellant with six others emerge and join the three people. One of them grabbed the deceased and started boxing and slapping him. According to Mukuria because of the beatings the deceased fell to the ground and the appellant stepped on his head. One other man stepped on his chest. He could not get up but the appellant and another person helped him to get up

and supported him walk away. Mukuria testified that 30 minutes later the appellant came back with a stick and threatened to beat him up asking him why he was sitting with criminals. He alleged that the appellant had stolen all his goods from his hotel. Then on 10th November, 2005 Mukuria learned that the deceased had died. *Charles Kioko Kimina (Kimina)* was the deceased's brother. He received a report of the death of the deceased on 10th November, 2005 and when he came to Nairobi the following day he confirmed it from the officer in charge Ongata Rongai Police Station. He was accompanied by police officers and the appellant to the deceased's house where a search was conducted but nothing belonging to the appellant was recovered from that house. This witness also identified the body of the deceased on 18th November, 2005 to *Dr. Okemwa (Dr. Okemwa)* who performed a postmortem examination on the deceased body. The evidence of *Elizabeth Mutuku (Mutuku)* hinged on her discussion with the deceased on 8th November, 2005 in which he mentioned three people who had beaten him earlier that day. She testified further that when she got the information that the deceased had been injured she left her office at Kenya College of Communication & Technology where she worked and went to look for him. She found him lying beside the road near the bus station. He explained to her his ordeal at the hands of six people where the appellant said he suspected him to have stolen "a *sufuria*" containing flour from his hotel. The witness then assisted the deceased to walk to the bus station where they got some transport to Fatima Mission Hospital but here they were referred to Kenyatta National Hospital. The City Hoppa Bus they boarded dropped the deceased and Mutuku at the casualty department of the Hospital but he passed on before being attended to the hospital staff. However he was taken on a stretcher to the doctor's room who confirmed the deceased had died. The husband to Mutuku came round and they together went to report the matter to Ongata Rongai Police Station. Later the appellant was arrested.

Force No. 76765 *Pc. Jimna Thuku (Thuku)* was at the report office on 8th November, 2005 when the appellant came there with a report of theft and he brought two suspects. As a result of this report, the suspects *Agnes Nduko (Nduko)* and another were placed in cells. At around noon, the appellant came back to station, and this time, he brought in the deceased who was bleeding from the head. He was also wearing a bloodstained shirt. The appellant alleged the deceased had been assaulted by members of the public on the allegations of theft of various items including plates, cups, spoons and wheat flour from his, (*the appellant's*) hotel. The deceased was placed in cells because of this report. *Nduko* a suspect earlier placed in cells because of similar allegations made against her and the deceased testified that amongst the people who arrested her was the appellant. He carried a *rungu*.

Dr. Zephania Kamau (Dr. Kamau) examined the appellant as to his fitness to stand trial while *Dr. Okemwa* carried out a post mortem examination on the body of the deceased on 18th November, 2005. He assessed the deceased to be 33 years of age, with food materials splattered over the face. He had a scalp bruises and lacerations on the left side of the head. The head had a bleed on the left side of the brain with fractured ribs 3, 6, 7 & 8. As a result of this examination the witness formed the opinion that the cause of the deceased's death was head injury due to blunt object trauma. Further evidence in this case was adduced by No. 38954 *Cpl. Richard Kimeu (Cpl.Kimeu)*, who was then attached to the Criminal Investigations Department and who was instructed to investigate this case. During his initial investigation it was the appellant who was treated as the complainant in a case of alleged theft of his hotel property. The deceased was among the suspects. A search was carried out in the deceased house in the presence of the appellant but nothing was found there belonging to the appellant. But when this witness recorded a statement from Mukuria, it appears to have implicated the appellant with the deceased's death. *Kimeu* eventually compiled his report which he forwarded to the office of the Attorney-General. This is why the appellant was subsequently arrested and charged with the offence of murder as already stated herein before.

When the appellant was placed on his defence he opted to give sworn evidence and stated that he was on duty on 7th November, 2005 up to 8.30 p.m. when he left behind his worker *Nzuvu Mbithi* and went to sleep. *Mbithi* was not called as a witness in this case. Next day when he went and opened his business at 5.00 a.m. the appellant discovered his worker said was absent and that a number of items were missing from the hotel. They included "6 *sufurias* 32 spoons 32 plates 1 water drum, prepared wheat flour to make *chapati* and *mandazi*, sugar and milk." He told one *Muli* about it. He looked for the said worker, *Nzuvu Mbithi* and traced him in the house of *Somba*. *Nzuvu* told the appellant that thugs had invaded the

place and stolen all the property from there after forcing him to lie down, and that one of the thugs identified by Nzuvi was the appellant. Nduko was also a suspect Nzuvi pointed out in the robbery but when found he denied taking part in it. Nzuvi and Nduko were escorted to Ongata Rongai Police Station and locked up as suspects.

The appellant testified that he then went to his house but at around 9.00 a.m. he heard shouts of “catch a thief, catch a thief catch a thief,” by a group of people who were running towards the African Inland church. He went towards the direction the shouts had come from and when he reached there he found the deceased had been beaten by members of the public and had fallen down. He and members of the church prevailed upon the members of the public to take the deceased to the police station which was done. A police officer at the station told the appellant to take the deceased to the hospital but he could not do so as he had no money. That they found Nduko and Nzuvi at the police station and it was Nzuvi who pointed an accusing finger at Mutiso as the person who was allegedly led the gang which robbed the appellant’s hotel. Nduko also told Mutiso to return the goods they had stolen to the owner. It was then that the deputy officer in-charge of the station told the appellant to leave him with the suspects and to come back the following day but when he came back he found the deceased had been released on a police bond in order to seek medical treatment. When the appellant was told of this he left the station and went home but at 11.00 p.m. the same day two police officers visited him at his house and told him he was wanted by the officer in charge of station. When he reached there he was arrested and placed in cells together with other suspects and later informed that the deceased he had taken to the station earlier had died. He was then charged with the offence subject to this appeal which he denied saying when he reached the scene where the deceased was he had already been assaulted. He said he had given Mukuria notice to quit the premises as the caretaker of the place due to his bad habits and believed that was the reason for the allegations he, Mukuria, made against him, the appellant.

During cross-examination the appellant reiterated that when he came to the scene he found the deceased already injured but took him to the police station because he had been implicated in the theft which was committed at his hotel. He denied the evidence of Mukuria that he was one of the six people who assaulted the deceased or that he knew him. He did not join members of the public in assaulting the deceased though he was annoyed by the theft.

In his judgment (*Muga Apondi, J.*) delivered himself thus:-

“It is apparent that the said incident took place at around 11.00 a.m. That was obviously during broad daylight and hence the accused was identified clearly. It is apparent to this court that the accused led a group of six people to assault the deceased. That apart the accused himself stepped on the head of the deceased while another assailant stepped on the chest. There after the accused went back to the scene and threatened PW1. The accused and his friends assaulted the deceased due to the fact that he had been implicated in stealing sufurias, spoons, plates a drum of water, wheat flour sugar and milk from his hotel. The fact that the accused led a group of six to assault the deceased shows clearly that he had the intention of either killing him or causing grievous harm to him. Assuming that the accused had any concrete evidence to implicate the deceased in the hotel breaking and stealing then the proper procedure would have been to either report the matter to the police for further investigations or alternatively arrest the accused and hand him to the police for further necessary action. It was not proper for the accused to have taken the law into his hands just because he was incensed by the theft in his hotel. Though initially the accused and the other assailants were not armed at the out set, their conduct in assaulting the deceased in a group shows they had bad and commotions (sic) intension. The fact that the other assailants were not arrested and that it is unclear as to who administered the fatal blow does not absolve the accused from the blame. In addition to the above there was no evidence whatsoever to suggest that PW1 had any grudge to motivate him to give false testimony against the accused for such a serious offence. It is due to the above reasons and analysis that I hereby wish to differ with the unanimous verdict of the assessors. As far as the defence case is concerned, it is obvious to me that the accused was very economical with the truth. This court was not impressed at all with the accused person. In view of the above, I hereby dismiss the defence case since the same does not ring true at all.

The upshot is that I hereby find that the prosecution has proved its case beyond any reasonable doubt

against the accused. I find the accused guilty of the offence of murder contrary to section 203 as read with section 204 of the penal code. The accused is convicted accordingly.”

The appellant was aggrieved by his conviction and sentence. According to the record of appeal he filed in this Court on 20th September, 2007 two home made memoranda of appeal which had five grounds of appeal each were filed. They were, however, abandoned at the hearing of the appeal because his advocates, Messrs Muriuki Ngunjiri & Company filed in substitution therefore a supplementary memorandum of appeal on 9th January 2009 which had six grounds of appeal on which he based his submissions. The grounds were as follows:

- “1. That the learned trial Judge erred in law (sic) failing to appreciate that the appellants’ constitutional rights as enshrined under section 72(3) was unjustifiably violated without any explanation.*
- 2. That the learned trial Judge erred n law and in fact on relying on unproved facts to arrive at the judgment convicting the appellant.*
- 3. That the learned trial Judge erred in law and in fact in relying on contradicting testimony of the witnesses for the prosecution and consequently arriving at erroneous decision.*
- 4. That the learned trial Judge erred in law and in fact in making a positive finding of fact that there was in the circumstances of the case “common intention” and failing to explain the same to the assessors in his summing up.*
- 5. That the learned trial Judge erred in law and in fact in his assessment of the evidence and arrived at findings that were contrary to the evidence on record and consequently at an erroneous decision.*
- 6. That the learned trial Judge erred in law and in fact in failing to appreciate the offence charged and which lack should have benefited the appellant with reasonable doubt.”*

We heard counsel for the appellant and Senior Principal State Counsel for the State submit on this appeal on 4th June 2009. Mr. Mwangi learned counsel for the appellant complained about alleged violation of the appellant’s constitutional rights of not being taken to court within the prescribed period as is provided or required by the constitution and that no explanation for the delay was offered. According to him, once a delay was shown, the appellant was entitled to an acquittal. Counsel submitted further that the appellant was convicted on insufficient evidence which was also contradictory. He stated that this is why the assessors returned a unanimous opinion of “*not guilty*” for the appellant and there was no reason given by the Judge as to why he differed with the opinion of the assessors. Counsel submitted that Mukuria did not say the appellant assaulted the deceased; and in any case his evidence was not corroborated by any other evidence. That there was no basis for the learned Judge holding that there was a common intention between the appellant and the other assailants to assault the deceased and no evidence established that the people who beat up the deceased planned to do so hence there was no evidence of malice aforethought.

Mrs. Murungi, Senior Principal State counsel supported the appellant’s conviction and the sentence though she proposed it be reduced to one of manslaughter as in her view there was no evidence of malice aforethought. She held the view that the appellant was identified as the one who stepped on the deceased’s head injuring him. On constitutional violations the Senior Principal State counsel stated that the appellant was represented by counsel in the superior court but he did not raise the issue there to put the prosecution on notice in case they had an explanation to offer. On the issue of contradictions in the dates of the commission of the offence, she contended that these were not material.

It appears in this appeal the material evidence the learned judge considered in convicting the appellant was that of Mukuria the relevant parts of whose evidence was as follows:

“Afterwards two people came though I did not know them. They greeted Mutiso and started talking

Kikamba though I did not know the language. Later Mutiso escorted them. When they walked about 8 metres Gideon (the accused) emerged with six people and another man grabbed Mutiso on both sides and started boxing and slapping him. Due to the assault Mutiso fell down and Gideon (accused) stepped on his head and the other man stepped on the chest. The other man dared Mutiso to stand up. However he was unable to do so. The fight took about 30 minutes. The assailants were not armed. Accused was wearing safari boots. Eventually, the accused and the other man raised the deceased and walked away with him. The assailants were supporting him because he could not walk. After about 30 minutes, the accused came with a stick and threatened to attack me. The accused asked me why I was sitting with criminals. The accused claimed that the deceased had gone and stolen all his goods in his hotel. Accused never explained when the theft took place.”

As can be seen, apart from the appellant whose name this witness mentioned, none of the people Mukuria calls the assailants were named, not even those whom Mukuria escorted from where he was working. Even the person who held the deceased and started boxing and slapping him was not named. During cross-examination Mukuria answered that

“initially both assailants assaulted the deceased on the head.”

These assailants are not known or named.

Mutuku talked to the deceased just before he died. This discussion would be construed to be the deceased’s dying declaration. According to her evidence, the deceased complained of having been assaulted by three people. Her evidence on that aspect was as follows;

“Stanley said that the hotel owner suspected that he had stolen a sufuria containing flour. Stanley told me that the owner was called Mwaniki. He also told me that he had (sic) beaten on the head with an iron bar. Apart from above, he also complained that he had been assaulted on the chest, the back and the ribs.”

As can be seen too, Mutuku is saying that the deceased was complaining about being assaulted on the head with an iron bar which Mukuria did not mention as he clearly said none of the assailants were armed. The evidence of *Thuku*, a police officer, was that a person went to his office on 18th December 2005 to make a report. The person had two suspects, namely *Agnes Nduko* and *Nzuvi Mbithi*. The reporter was the appellant who came back later to record a statement but this time round he brought in another suspect who was bleeding from the head and wearing a bloodstained shirt. This third suspect was the deceased. The appellant reported that the deceased had been assaulted by members of the public.

The suspect Nduko was a witness in the case. She met the deceased at Home Pub on 8th November 2005 at 5.00 p.m. where he was taking some beer. She also saw Nzuvi who was sitting with the same deceased at that pub. She then went home and slept and it was the next day 9th November 2005 when a group of people went to her house and asked her to release the goods she had stolen from the appellant’s hotel with the deceased. Nduko did not know any member of the group except the appellant and she invited them to search her house which they did but found nothing. By then they had already arrested Nzuvi, the other suspect, who was bleeding from the mouth. She was taken to Ongata Rongai police station at 9.00 a.m. and at 1.00 p.m. the deceased was also brought there. According to Nduko the appellant carried a rungu when the deceased was taken to the station he was bleeding from his head and also holding his stomach. He started vomiting soon afterwards and was taken to a male cell but next morning Nduko saw him crawling to the report office. All this shows how seriously he had been injured. These dates as given in the foregoing evidence are the ones the appellant’s counsel said contradicted each. That might be so but we cannot say they go to the core of the case.

Another piece of evidence touching on the appellant was that of Kimeu. When this witness was handed this complaint to investigate the appellant was already under arrest. The witness was given names of two other suspects who were with the appellant, they were Mumo and Muli but they did not feature in this case. The witness searched the house of Nduko but found nothing belonging to the appellant there. She was then released pending further investigations. According to the evidence of Kimeu, on 15th

November 2005 another police officer, a Mr. Kamande, took the appellant to the house of the deceased to confirm whether the latter had stolen anything. He was in company of the appellant who confirmed that there was nothing belonging to him found in the deceased's house. Kimeu then visited the scene of the murder of the deceased where he recorded the statement of Mukuria and then he compiled his file and forwarded it to the Attorney-General's office from where instructions must have been issued that the appellant be charged with the offence of murder.

From the whole evidence adduced before the trial Judge it was only that of Mukuria which implicated the appellant with having stepped on the head of the deceased but by this time one of the other men had already boxed and slapped the deceased who had fallen to the ground. And when the deceased talked to Mukuku moments before he passed on he complained of:

1. *Having been beaten by three people.*
2. *that the hotel owner whose name he gave as Mwaniki had suspected that the deceased had stolen a sufuria containing flour.*
3. *he had (sic) beaten on the head with an iron bar. This is the first time the iron bar is introduced in this case. Mutuku who testified first said nothing about it.*
4. *that he had been assaulted on the chest, the back and the ribs.*

As we said earlier this would properly be termed a dying declaration because the discussion about the events leading to the deceased's death with Mutuku were immediately before he died. But apart from the complaint attributed to the appellant that he suspected the deceased for stealing his sufuria containing flour, nowhere during the discussions was it revealed that the appellant at any one time beat up the deceased. This then only left the evidence of Mukuria to satisfy the court as to who caused the death of the deceased. Did his evidence do so? We shall say something about it herein after.

We have reconsidered, reassessed and re-evaluated the evidence adduced before the trial judge well aware we had no advantage of seeing or hearing the witnesses testify and so cannot adequately comment about their demeanour. Ground 1 of the grounds of appeal complains about the violation of the appellant's constitutional rights as enshrined in *section 72(3)* of the Constitution. This section provides as follows:

"72(3) A person who is arrested or detained

(a) ...

(b) Upon reasonable suspicion of his having committed or being about to commit, a criminal offence, and who is not released, shall be brought before a court as soon as is reasonably practicable, and where he is not brought before a court within twenty four hours of his arrest or from the commencement of his detention or within fourteen days of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before account as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this sub section have been complied with."

In this appeal the appellant complained that he was not brought before the superior court within the required period and that in fact there was a delay of 36 days. This court has previously stated in this regard that where any such constitutional violation is detected, it should be brought to the notice of the prosecutor or state counsel as soon as possible to give him an opportunity to explain the delay. In the case subject to this appeal in particular where the appellant was represented in the superior court by counsel, this point would not have escaped his mind. It was never raised. On the sufficiency of evidence upon which the appellant was convicted, while no particular number of witnesses is required to prove a particular fact, see *Abdallah Bin Wendo & Another v. Rex (1953) 20 EACA 166 at P. 168*, we are of the

view that only Mukuria was able to adduce evidence to identify those who beat up and injured the deceased but the best he could say about the appellant was that he stepped on the head of the deceased after one other person had already held him on both sides, boxed, slapped and dropped him to the ground. Though the appellant indicated to Mutuku that he had been beaten on the head he did not implicate the appellant with this blow. *Dr. Okemwa* attributed the deceased's death to bruises and lacerations on the left side of the head which also had a bleed on the left side of the brain. We are aware the appellant was charged alone with this offence but the evidence adduced shows many people were involved in assaulting the deceased and in the circumstances it would have been difficult to say who of the group administered the fatal blow. It was even more surprising that although when the appellant left behind Nzuvi Mbithi when he closed his business on the night when the offence was committed and found him missing next morning, he Nzuvi, was neither questioned nor called to give evidence in the case though he had mentioned the deceased as a suspect. It was also surprising that although he alleged a robbery had been committed at the hotel while he was there, he never reported the robbery to anybody until the appellant found him sleeping at Somba's house next day. Even then he himself did not mention the name of the deceased to the appellant as one of the members of the group who committed the robbery at the hotel. That the appellant was the complainant and he suspected the deceased and others of having broken into his hotel and stolen a number of items therefrom was not sufficient in incriminating him with the offence with which he was charged. No reasonable court would say in the circumstances of this case, that the charge of murder against the appellant was proved beyond any reasonable doubt.

However, given the evidence of Mukuria that the appellant stepped on the deceased's head, we think that this evidence proves a charge of assault causing actual bodily harm contrary to *section 251* of the Penal Code against the appellant. In the circumstances we allow this appeal, quash the appellant's conviction and set the sentence imposed on him and substitute therefor a conviction for the offence of assault causing actual bodily harm contrary to *section 251* of the Penal Code. As to sentence the appellant was sentenced on 29th May 2007. Since then he has been in custody. In those circumstances we sentence him to three years imprisonment to run from the date of conviction.

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

S. E. O. BOSIRE

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JUDGE OF APPEAL

D. K. S. AGANYANYA

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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