



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT KISUMU

CRIMINAL APPEAL 309 OF 2008

ANDREW OKOTH SIMBA.....APPELLANT

AND

REPUBLICRESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Kisii (Musinga, J.) dated 10th November, 2008

in

H.C.CR.C. NO. 47 of 2004)

JUDGMENT OF THE COURT

ANDREW OKOTHI SIMBA, the appellant, was charged in the superior court at Kisii with the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code. The facts of the case were that on the 15th day of April, 2004 during day time at Kokech Location in Rachuonyo District within Nyanza Province murdered **GEORGE OTIENO SIMBA**, the deceased. Seven witnesses called by the prosecution in the case testified before and their evidence was recorded by a Judge of the superior court Honourable (Kaburu Bauni, J.) who also summed it up to the assessors. After the assessors returned their opinion, the learned Judge then set the judgment date on notice. Though there is no rule which specifically prohibits this practice, we do not think it is right to use it in practice to set judgments in criminal cases. However, after the judgment date had been set as aforesaid, the learned Judge passed on and the case was taken over by a new Judge posted to the station (Musinga, J.) who under **section 200** as amended by **section 201** of the Criminal Procedure Code, wrote and delivered his judgment on 10th November, 2008. He convicted the appellant and sentenced him to death as mandatorily provided by law. The appellant was aggrieved by the conviction and sentence and has appealed to this Court.

Being a first appeal, we have the duty of reconsidering and re-evaluating the evidence in order to draw our own conclusions in deciding whether the judgment of the superior court should be upheld - **OKENO v REPUBLIC [1972] E.A 32**. **John Ouma Mboga** (PW1) “Mboga” was a step-brother of the appellant as their mothers are different. He testified that on the day of the incident at around 3 p.m. he was burning charcoal near the gate of the family house. The deceased passed by to go and untie cattle in the field while the appellant was grazing their cattle around. The appellant followed the deceased and returned 10 minutes later. The deceased never returned from where he had gone to untie the cattle. Then he saw the cattle the deceased had gone to untie in some shamba and alerted the appellant about it but the latter told him to go and drive them out of the shamba which the witness did. When Mboga was coming back to

where he was burning the charcoal he saw the deceased's body on a footpath about 20 metres away. The head had been chopped off and the body was stuffed in a sack. The upper part was visible. Mboga told the superior court that the appellant who was nearby told him to go and bring another sack. He never did but asked the appellant if he was the one who killed the deceased but he did not answer. According to the witness when the appellant followed the deceased where he had gone to untie the cattle, he was armed with a panga. The witness raised an alarm and people came round including **Evans Onditi** (PW3) "Onditi" and **John Wagunde Onditi** (PW4) "Wagunde". The matter was reported to the area chief one **Tom Ochola Odhiambo** (PW7) "Odhiambo" who reported the incident to Oyugis Police Station where **No. 58491 Corporal Daniel Osano** (PW6) "Cpl. Osano" took over the matter and visited the scene of the incident. He saw the deceased's body in a bush which was in a sack. In company of one **Corporal Charles Chebet**, they removed the body to Masongo Mortuary where **Dr. Peter Ogola** (PW2) "Dr. Ogola" performed a postmortem examination thereon on 4th April, 2004 (sic). He formed the opinion that the deceased's death was due to decapitation of the head. This witness also examined the appellant as to his physical and mental fitness which he recommended to be alright.

In the meantime **Erick Onditi Ogode** (PW5) "Ogode" the father to both the deceased and the appellant looked for and found the appellant coming home from wherever he was. He apprehended and took the appellant to Oyugis Police Station on 17th April, 2004. The appellant was later charged with the offence of murder as hereinbefore stated. The appellant's unsworn defence was that he was not at the scene of the incident when it happened. He went to Homa Bay on 16th April, 2004 to call his mother to come and build a house for them. On his way he met **George Ouma** and the deceased, and he told them where he was going. But when he returned the next day he was told he had killed the deceased which allegation he denied. In spite of his denial he was taken to the police station where he was charged. He told the superior court that he knew nothing about the deceased's death. In the judgment of the superior court (D. Masinga, J.) it was stated: -

"From the evidence, it is clear that on the material day the deceased was with PW1 and the accused. PW1 saw the accused following the deceased as he held a panga. About ten minutes thereafter PW1 saw the deceased's headless body in a sack. The accused asked PW1 to go and bring another sack. When PW1 asked the accused whether he was the one who had murdered the deceased, the accused did not respond. However, the accused was holding the same panga, that he had earlier, only that now it was blood stained.

Immediately after the said incident the accused disappeared for two days. Taking all the above evidence in consideration there is overwhelming circumstantial evidence that the accused was the only person who could have murdered the deceased.

In this case, although the accused was not seen killing the deceased, all the available evidence points to an irresistible conclusion that he must have been the killer. His defence is untenable. In any event he avoided any mention of his whereabouts on 15th April, 2004. Consequently, I find the accused guilty of murder as charged and convict him accordingly."

It is this judgment which has given rise to the present appeal. The appellant's advocates Messrs Ouma Njoga & Company lodged in this Court a memorandum of appeal on 28th July, 2009 in which they listed three grounds of appeal as follows: -

- 1. That the learned appellate judges (sic) erred in law in failing to analyse and consider the evidence as tendered by the prosecution as against that tendered by the defence to uphold the trial court's conviction and sentence.*
- 2. That the learned appellate judges erred in law in failing to appreciate that the charges as framed and drawn were so defective and did not match the evidence tendered and thus could not be a basis of sound conviction and sentence.*
- 3. That the learned judges erred in law in failing to consider that the prosecution did not either directly*

or circumstantially establish malice aforethought.

On the date of the hearing of this appeal on 3rd August, 2009, learned counsel for the appellant, Miss Abir, abandoned ground 2 of the memorandum of appeal and argued grounds 1 and 3 as one. She submitted that the circumstantial evidence adduced in the superior court did not irresistibly point to the appellant saying though Mboga (PW1) was the main witness in the case he did not tell the court when the sack in which the deceased's body was found was taken to the scene. According to her the evidence adduced did not meet the standards required in a case of this nature and that the panga used to kill the deceased was not identified in court though it was an important exhibit. Miss Oundo, learned Senior State Counsel, opposed the appeal and submitted that the evidence adduced against the appellant and his conduct implicated him in the commission of the offence.

Apparently this case was decided on the basis of circumstantial evidence. The case of KIPKERING ARAP KOSKE and KIMURE ARAP MATATA (1949) 16 EACA 135 at page 136 gives the standard required to prove a case based on circumstantial evidence. Borrowed from Willis on circumstantial evidence 6th Edition p. 311 the predecessor of this Court stated as follows:

“In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.”

The court then added: -

“The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused.”

Although Mboga was near the scene of the incident, he did not witness what happened to the deceased but he saw him go from his home towards some direction in order to untie his cattle. He also saw the appellant there grazing his cattle and that when the deceased passed and went towards the direction of the cattle, the appellant followed him in that direction. It was apparently bushy. When the appellant came back, Mboga never saw the deceased come back.

The witness also saw the cattle the deceased had gone to untie grazing in the shamba towards the direction he the deceased had gone and when he alerted the appellant about it, the appellant asked him to go and drive them out of the shamba. It is when the witness went there that he saw the headless body of the deceased placed in a sack and when he informed the appellant about it, the latter instead told the witness to go and bring another sack. He did not say for what purpose the witness was to bring another sack. This must have prompted the witness to ask the appellant if he was the one who had killed the deceased to which the appellant never replied. The witness also saw the appellant with a panga when the latter followed the deceased in the direction he had gone to untie the cattle.

The prosecution evidence, particularly that of PW5 and PW6 stated that the appellant disappeared after the incident. In his own defence he says he went to see his mother at Homa Bay on 16th April, 2004 but says nothing about 15th April, 2004, the day he is alleged to have committed the offence which landed him in the superior court. The evidence of the appellant's father (PW5) was more exerting about the appellant's disappearance. He stated:

“I recall on 17th April, 2004 at 6.20 a.m. we went looking for the accused who had disappeared after killing the deceased on 15th April, 2004. I was at Masogo when the incident occurred. I work there as a watchman. We looked for accused in a forest. We met accused coming back home. He had a panga. We asked him to give us the panga he complied. We then took him to police station.”

With this evidence added to what PW1 observed, we are satisfied that the superior court did not err in coming to the conclusion that it was the appellant who murdered the deceased. Malice aforethought

would be inferred from the manner the deceased's head was severed from the body; a clear case of an intention to cause such grievous harm as would result in the instant death of the deceased.

The upshot of the above is, that, we see no merit in this appeal and we order it to be dismissed

Dated and delivered at Kisumu this 7th day of August, 2009.

P.K. TUNOI

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JUDGE OF APPEAL

D.K.S. AGANYANYA

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JUDGE OF APPEAL

J.G. NYAMU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR