IN THE COURT OF APPEAL OF KENYA

AT ELDORET

CRIMINAL APPEAL 336 OF 2008

COLLINS ELIM LEMUKOL …….……. APPELLANT

AND

REPUBLIC …….. RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Kitale (Karanja, J.) dated 26th June, 2008

in

H.C.CR.C. NO. 31 OF 2003)

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JUDGMENT OF THE COURT

The appellant **Collins Elim Lemukol** alias **Fred** was convicted by the superior court sitting at Kitale (W. Karanja, J.) of the offence of murder contrary to **Section 203** as read with **Section 204** of the Penal code and sentenced to suffer death. The charge stated that on 16th March, 2003 the appellant and one **Gibril Ekadel** alias **Simulik** jointly with another at Kanamkemer Parish in Turkana District murdered one **Anna Nanjala Barasa**.

The deceased was a Catholic Sister of Visulaine Congregation headed by **Sister Chair Tobin** (PW9) and was living at Kanamkemer Convent in Lodwar, Turkana together with Sisters **Florence Kawingi Nyamai** (PW1). **Rose Wasike** (PW2) (Rose), **Jacinta Kerubo** (PW3) (Jacinta), **Alice Namalwa Muliro** (PW5) (Alice). The convent had six bedrooms, sitting room, dinning and a kitchen and was located 30 metres from the house of the Parish **Priest Father John Hirehold** (PW4) (John). There were two watchmen – a day watchman and a night watchman. The night watchman was called Charles.

On 16th March at about 4 p.m., Sisters Rose and Alice were at the Convent awaiting the watchman to off-load the pick-up so that they could go for shopping. As the watchman was offloading the pick-up, two men appeared and asked to be allowed to see Bishop Mahon. Sister Rose told them that the Bishop would not be disturbed at that time and she drove off in the company of Sister Alice leaving the two men with the watchmen. The two sisters returned to the convent at 6 p.m.

At about 9.00 p.m. when all the sisters were in the convent somebody called sister Jacinta from the

bedroom window saying that he was Charles the watchman and that he had been bitten by a snake. The man was groaning and sister Jacinta frantically searched for medicine, ran to the sitting room and shouted to the man to go round to the front door where he could be helped. Meanwhile, the deceased who was in the sitting room said that she wanted to confirm if the man was indeed Charles and opened the front door slightly and peeped outside. Thereupon a man wearing a T-shirt pointed a gun inside the sitting room and opened fire shooting the deceased on the head and on shoulder. The deceased fell down near the door bleeding profusely. Father John went to the scene and thereafter took the deceased to hospital. He also reported to police. She was however pronounced dead on arrival at the Hospital. Dr. Brown Mapesa who performed a postmortem on the body of the deceased later found that the bullet on the head had crushed the deceased's brain, skull and cheek and further that a bullet had also shattered the deceased's right shoulder blade. He formed the opinion that the cause of death was due to cardio-respiratory arrest following blown off brain and excessive blood in the chest cavity due to gunshots. IP. Luke Oduor Okumu (PW11) (IP. Okumu) of Turkana Divisional Criminal Investigation Department (CID) visited the scene and recovered two spent catridges. On 1st April, 2003, the appellant was arrested by PC. Daniel Lokale (PW7) on information as a suspect and handed over to IP Okumu. The appellant was interrogated and thereafter led IP. Okumu and other police officers to a Manyatta at Kolokor where one AK 47 rifle and a magazine containing 13 rounds of 7.62 mm ammunitions was recovered. The rifle, amminution and the two spent catridges earlier recovered from the scene were examined by CIP. Lawrence Nthiwa Ndiwa, a Firearms Examiner who formed the opinion that the two spent cartridges were fired from AK 47 rifle recovered from a Manyatta. On 5th April, 2003, Sister Rose identified the appellant in an identification parade conducted by IP Wilfred Karira (PW6) as one of the two men who went to the convent on the same day that the Convent was raided.

The appellant denied at the trial, among other things, that he went to the Convent on 16th March, 2003 at 4.00 p.m.; that he raided the convent on the same day and that he led police to a Manyatta and showed them where the rifle was hidden.

The superior court after considering and evaluating the evidence made findings of fact that the appellant was identified by Sister Rose in a properly conducted parade as one of the two persons who went to the Convent on the day the Convent was raided; that it is the appellant who led to the recovery of the rifle; that the recovered rifle was used to kill the deceased and that the evidence of the appellant was not truthful.

The appellant has appealed against the judgment of the superior court on four broad grounds, firstly, that the conviction was a nullity since the appellant was taken to court five months after the arrest in breach of **Section 72 (3)** of the Constitution; secondly, that the evidence of identification of the appellant by Sister Rose was not properly evaluated and was unsatisfactory, thirdly, that the evidence of IP. Okumu, that appellant led to the recovery of the rifle was not reliable; that there was no linkage between the weapon used (rifle) and resultant injuries; and fourthly, that malice aforethought was not proved.

On the question of breach of the appellants constitutional right it is true that **Section 72 (3)** of the Constitution requires, among other things, that a person suspected of having committed an offence punishable by death should be taken to court as soon as is reasonably practicable and that where he is not taken to court within fourteen days of his arrest, the burden of showing that the person has been taken to court as soon as reasonably practicable rests on the person asserting that Constitution has been complied with. Mrs. Sitati Kimathi, learned counsel for the appellant in support of this ground submitted that the appellant was arrested on 2nd April, 2003 but was taken to court on 23rd September, 2003. This ground was raised without verifying the state of law at the time the appellant was arrested. By then, the law required that a person suspected of having committed murder had to be taken before the subordinate court first for committal proceedings at which the subordinate court should commit the suspect to High Court for trial. The committal proceedings procedure was repealed by *Criminal Law (Amendment) Act No. 5 of 2003* which came into operation on 25th July, 2003. By April, 2003 when the appellant was arrested he had to be taken to the subordinate court for committal proceedings. It is after the committal order that the Attorney General could frame the Information (charge) formally charging the suspect with the offence. Indeed, the record shows that the prosecution was waiting for committal bundles and that the Information

was not prepared until 18th December, 2003 and the appellant arraigned in court on 19th December, 2003. We need not consider this ground further save to say that it has no legal basis.

The evidence of Sister Rose on the identification of the appellant on 16th March, 2003 has been seriously questioned. It is our duty as a first appellate court to re-evaluate the evidence, reconsider it and make our own independent findings. According to Sister Rose two men went to the Convent on the material day at 4.00 p.m. when she was about to leave for shopping. She identified the appellant about 20 days later at an identification parade. She testified that the appellant had a beard on the material day but she could not remember the clothes that he was wearing. She did not describe the particular features which made her to identify him almost three weeks later. It is apparent that she did not spend much time with the appellant before she left for shopping. The evidence of IP. Wilfred Karira shows that while Sister Rose identified the appellant at first when the appellant was wearing a shirt, she failed to identify the appellant when he removed the shirt and changed position. It is an important consideration that Sister Alice who was in the company of Sister Rose and who saw the two people under the same circumstances failed to identify the appellant at the identification parade. On our consideration of the evidence of identification, we agree that the identification is doubtful. No doubt Sister Rose was an honest witness but may have been mistaken about the identity of the two people.

The evidence of identification of the appellant by Sister Rose was in any case very weak circumstantial evidence for there is overwhelming evidence that the persons who attacked the Convent on the night of 16th March, 2003 were not identified by Sister Rose or by any other person. In the absence of the evidence of identification of the appellant, the only other evidence which connects the appellant with the murder is the evidence of IP. Okumu that the two spent catridges were recovered from the scene and that the appellant led to the discovery of the rifle, and, also the evidence of the Ballistic expert that the spent catridges were fired from the rifle. However, the appellant's counsel submitted that the evidence of IP. OKumu was not reliable for several reasons, namely, that he did not explain where the spent catridges were recovered, that he did not state in his statement that he went to the scene and recovered spent catridges; that he beat the appellant and demanded money from co-accused and that the other police officers present at the time of the recovery of the rifle did not give evidence.

It is true that IP. Okumu admitted during cross-examination that his statement does not show that he visited the scene and recovered two spent catridges. However, it is not entirely correct that he did not describe where the spent catridges were recovered for he stated in his evidence in chief:

"**The two catridges were outside the house. One bullet had gone through the door. The body was still lying by the door inside the house".**

The evidence of IP. Okumu relating to the position of the body of the deceased is consistent with the evidence of several witnesses, namely, Sister Florence, that after the deceased was shot and fell down, she pulled her from the door; the evidence of sister Rose that deceased was lying down near the door towards the bedroom; the evidence of Father John that deceased was lying on the floor and the evidence of Sister Alice that deceased was lying on the floor bleeding. IP. Okumu testified that he was at the time doing investigations as Deputy DCIO and that he later handed over the exhibits to CI. Warutere – the DCIO. The DCIO – CI. Francis Warutere (PW12) who was on leave at the material time testified that when he resumed duty, IP. Okumu handed to him spent catridges and an AK 47 firearm.

The appellant was arrested by PC. Daniel Lokale who handed him over to IP. Okumu who testified that upon interrogation, the appellant volunteered information and led him to a Manyatta at Kolokor where he pointed out at a structure and a rifle and a magazine with 13 rounds of ammunition was recovered. In his evidence in cross-examination he said:

"**A1 is the one who led us to where AK47 was recovered. It was in a deserted Manyatta".**

The superior court considered the evidence of recovery and made a finding, thus:

"**After he was taken to police station, I am satisfied that he took PW11 and other police officers to**

the structure where the rifle in question was recovered from. PW11 had no way of knowing where that rifle had been kept. This evidence of recovery was admissible under Section 31 of the Evidence Act.

……..

I am satisfied however that he is the one who led to its recovery".

The appellant claimed in his evidence that IP. Okumu is among the police officers who beat him asking him to admit having committed the offence. He did not complain about the beating when he was first taken to court for plea. He did not go for medical examination. His evidence, thus, lacks credence. The appellant did not complain that IP. Okumu or any other police officer demanded money from him.

The trial Judge saw and heard the witnesses including IP. Okumu give evidence. The trial Judge was a better judge of the credibility of the witnesses. As a first appellate court, we cannot interfere with the findings of the trial Judge based on the credibility of witnesses unless no reasonable tribunal could have made such findings or unless it was shown that there existed errors of law. See **Republic vs. Oyier** [1985] KLR 353.

On our own evaluation and reconsideration of the entire evidence, we are satisfied that the prosecution case was credible that IP. Okumu visited the scene and recovered two spent catridges outside the house and further that it is the appellant who led him to the recovery of the AK47 rifles.

At the time of the discovery of the rifle, **Section 31** of the Evidence Act was in force. That section provided that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence such information whether it amounts to confession or not, as relates distinctly to the fact thereby discovered, may be proved. The evidence of discovery of the rifle was properly admitted in evidence as against the appellant. **Section 31** of the Evidence Act was subsequently repealed by the *Criminal Law (Amendment) Act No. 5 of 2003*.

The appellant's counsel further submitted that there was no linkage between the weapon and the resultant injuries. She referred to the postmortem report which shows that the bullet wounds on the body of the deceased had slightly burnt edges, and to the evidence of Brown Mapesa that a bullet leaves burned edges. In contrast, she referred to a Treatise - *Handbook of Forensic Medicine and Medical Law* in Kenya by Alex Kirasi Olumbe and two others showing that entry gunshot wounds would have neat edges and exit wounds would have irregular shape with torn edges.

The appellant was represented at the trial and these matters should have been raised during the cross-examination of the Ballistic expert and the pathologist. They were not raised. So the court has not had the opinion of the experts on these issues. There was however overwhelming evidence that the injuries which caused the death were from gunshots.

Although the appellant was not in physical possession of the rifle, the fact that he led to the discovery of the rifle and the rounds of ammunition and pointed out to the structure where they were recovered shows that he was in law in possession according to definition of "*possession*" in paragraph (a) of **Section 4** of the Penal Code. The deceased was shot dead on 16th March, 2003 and the rifle was recovered on 1st April, 2003 – about 20 days later.

There was concrete evidence from the Ballistic expert which was not shaken in cross-examination that the two catridges found at the scene were discharged from the recovered rifle.

On analysis of the evidence, we are satisfied that the evidence of recent possession by the appellant of the rifle which was used in the murder of the appellant was strong circumstantial evidence which irresistibly connects the appellant with the murder of the deceased and that he was properly convicted.

In the result, the appeal is dismissed in its entirety.

Dated and delivered at Eldoret this 23rd day of October, 2009.

E. O. O'KUBASU

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

D. K. S. AGANYANYA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR