



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAKURU
Criminal Appeal 252 of 2006

JAMES IRUNGU MUTHINI

BENSON WAIGANJO NGECHHE
APPELLANTS

AND

REPUBLIC RESPONDENT

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

Nakuru (Kimaru, J.) dated 31st August, 2006

in

H.C.CR.C. NO. 42 OF 2002)

JUDGMENT OF THE COURT

The two appellants and one James Njuguna Njenga (co-accused) were committed to the High Court by the Chief Magistrate, Nakuru for trial on an Information of murder contrary to **Section 203** as read with **Section 204** of the Penal Code. The co-accused however absconded before plea was taken resulting in the amendment of the Information by deletion of his name from the charge. The two appellants pleaded not guilty to the charge but upon trial with the aid of assessors, they were convicted and each sentenced to death. This is their first and final appeal.

The amended Information stated that on the night of 31st December, 2000 and 1st January, 2001 at Gatongu Farm, Kabazi, the two appellants jointly with another not before the court murdered Samuel Mwangi Karori.

On the night of 31st December, 2000 there was New Year Eve prayers at Ambassador Church at Karanja Centre, Kabazi, Nakuru Town. The prayers or crusade was attended by many people from three neighbouring villages and was to be preceded by a cinema. Samuel Mwangi Karori (deceased), his younger brother James Ngige Karuru (PW2); (James), Paul Miyatho Ngui (PW1) (Paul), John Kariuki Ngige (PW5) (John) and Appolo Wokabi Mburu (Appolo) were among the people who attended the crusade. There was light from electricity at the platform where the preacher was. The deceased, Paul, James and John were standing at one side of the field, watching the cinema while Appolo was at another side of the field. Shortly after midnight, James Irungu Muthini (first appellant) went to where deceased

was and called him saying that he wanted to talk to him. The deceased left in the company of the first appellant. Shortly thereafter there was a commotion behind where Appolo was standing. Appolo turned and saw someone being strangled with a rope and some people armed with knives surrounding him and stabbing him. Appolo identified the first appellant, Waiganjo (second appellant) and another person who had dreadlocks (Rasta) as persons who were stabbing the other person later identified as the deceased. The deceased was attacked for about five minutes after which the attackers fled in different directions. Appolo went to the scene and recognized the deceased as the person who was attacked. The deceased had injuries on the head and was bleeding. The incident was announced through loudspeakers and Paul and John rushed to the scene. They found the deceased lying down bleeding from the head, chest and legs. Paul called the deceased's brother James who also went to the scene. The deceased, who was conscious, named the two appellants; Kuria and "Rasta" as the people who attacked him. There was no vehicle to take the deceased to hospital. James ran to his parents' home and reported to his mother Teresia Nyambura (PW3) (Teresia) and father Benson Karori Mwangi (PW4) (Benson) who in turn went to the scene. It was the evidence of the deceased's parents that they talked to the deceased and that the deceased named the two appellants and two other persons as the people who attacked him. James and his parents decided to report the incident and seek help at Kirengero police station. Meanwhile, while Stephen Mburu Chege (PW6) (Stephen), a retired Inspector of Police, was going about other business in the vicinity, he met the second appellant on the way. The second appellant reported to Stephen that he had been stabbed with a knife after a commotion at the crusade. Thereafter Stephen accompanied the second appellant to Kirengero police station to report. The second appellant reported to the O.C.S., C.I. Erastus Gitari (PW10) that he had been stabbed by the deceased who was in the company of his brothers. As the second appellant was making the report, the deceased's father accompanied by his wife arrived and others arrived at the police station and reported that deceased had been stabbed and was lying unconscious at the scene. He named and pointed the second appellant as one of the suspects. The 2nd appellant was arrested after which C.I. Erastus Gitari and other police officers went to the scene. They found the deceased lying unconscious with multiple stab wounds. The police took him to Nakuru General Hospital but he was pronounced dead on arrival. The first appellant was arrested on the same night in his house about one kilometre from the scene. Dr. Paul Gachunga (PW12) who performed the postmortem on the body of the deceased found that the deceased had a chest stab wound, a depressed skull fracture; a huge haematoma on the left parietal region with damaged brain and formed the opinion that the cause of death was cardio pulmonary arrest due to depressed fracture of the skull due to severe head injury.

The first appellant denied the charge and raised a defence of alibi. He testified that he left the church for his home at 8.30 p.m. and slept at 10 p.m.

The second appellant similarly denied the charge and raised a defence of alibi. He testified, among other things, that he lives in Nairobi; that he had come to the village to attend the funeral of his father on 30th December, 2000; that on the material day, he went to Gatongu farm to collect rent for properties left by his father; that he later went to Kawangare bar at Gatongu centre; that he drunk beer until 11 p.m. when he left for his home which was about 1½ kilometers away; that he was attacked by thugs on the way home; that he met Mburu Chege to whom he reported, that they both went to home of the second appellant and later reported to the police; that he was arrested by the police and that he did not attend the crusade at Gatongu centre.

The three assessors were unanimous in their opinion that each appellant was guilty of the offence. The superior court (Kimaru J) after analyzing and evaluating the evidence appreciated that the prosecution case was based on the three pieces of evidence, namely, the eye-witness account in the evidence of Appolo (PW7); the circumstantial evidence based on the evidence of Paul, James and John and lastly, on the dying declaration. The superior court made a finding that there was both light from electricity and moonlight at the scene; that both appellants were identified by Appolo; that the first appellant was identified by Paul, James and John when he called the deceased; that the deceased made a dying declaration which was sufficiently corroborated in respect of each appellant and that the defence of alibi of each appellant was not credible. The superior court said in respect of the alibi defences and the credibility of the witnesses thus:

“This court has considered the evidence that was offered by the accused persons in their defence.

Both accused persons offered alibi defence. They both testified that they were not at the crusade when the deceased was fatally stabbed. However having evaluated the evidence that was adduced and having seen the demeanour of the witnesses when they testified in court this court did not believe the evidence that the accused persons offered in their defence. It was obvious that the accused persons came up with the defence in a desperate bid to remove themselves from the scene where the deceased was assaulted. This court believes the evidence of the prosecution witnesses, particularly PW1, PW2, PW5 and PW7”.

The appellants have raised four substantial grounds of appeal viz, that the identification of the appellants was under difficult circumstances and such identification was not watertight; that Appolo was not a credible witness and his evidence should have been treated with caution; that the evidence of a dying declaration was doubtful, and, lastly, that the police failed to investigate the defence of alibi raised by each appellant.

It is the duty of the Court in a first appeal to analyze, re-evaluate and to re-consider the evidence and reach its own independent conclusion.

Mr. Mutitu, counsel for the appellants referred to evidence of several witnesses in order to show that there was no sufficient lighting at the scene. The superior court made a finding that there was sufficient light which illuminated the area where Paul, James, John and deceased were standing before the deceased was called and further that there was sufficient light which illuminated the area at the time deceased was assaulted. Paul testified that there was electricity light at the crusade and that they were watching cinema at the time the deceased was called but that there was little light where he later found the deceased lying as it was under the trees. James on his part testified that there was electricity light although spotlights were also being used.

The deceased's father Benson testified that he was using a torch when he went to the scene. John on his part testified that he had a torch while Appolo testified that there was electricity light from the platform where the preacher was. According to C.I. Erastus Gitari, there was lighting from security light where the deceased was lying. But according to P.C. Daniel Githiari (PW11), he had a spotlight when he went to the scene and there was also moonlight.

The evidence that the scene was illuminated by the electricity light is credible considering that the crusade was at a trading centre, a cinema was being shown and that the crusade was attended by many people. However, the fact that spotlights were also being used is indicative of the fact that the whole field was not sufficiently illuminated.

Regarding the identification the first appellant as the person who called the deceased and went away with him, the evidence of Paul, James and John was consistent. The three witnesses were standing near each other in the company of the deceased, almost at the back of the crowd watching the cinema about Jesus Christ. The first appellant went there shortly after midnight, called the deceased and told him that he wanted to talk to him. The two left but after ten minutes it was announced that somebody had been stabbed and on going to the scene the three witnesses found deceased lying on the ground with stab wounds. The three witnesses testified that they knew the first appellant before as they all come from the same village.

The submission by Mr. Mutitu that all the witnesses gave only one name of the suspect is not entirely correct for Paul referred to first appellant as James Irungu Muthini, while James referred to him as James Irungu.

The trial Judge weighed the first appellant's defence of alibi together with the evidence of the prosecution and believed the evidence of the prosecution witnesses. The rejection of the defence of alibi was based on the findings of the credibility of witnesses and we cannot interfere with them unless it is shown, among other things, which is not the case here, that no reasonable tribunal could have made such findings (see **Republic vs. Oyier** [1985] KLR 353). On our own evaluation of the evidence, we are satisfied that there was sufficient lighting at the place where deceased, Paul, James and John were

watching cinema and that they positively recognized the appellant by both visual identification as well as by voice as the person who came for the deceased and took him away. That the first appellant took the deceased away shortly before he was fatally assaulted a short distance away is a strong circumstantial evidence which irresistibly points at the first appellant as one of the assailants.

Regarding the identification of the two appellants at the time of the assault, Appolo testified that there was electricity light from the platform where the preacher was. According to Paul, there was little light where deceased was lying because he was lying under trees. James also testified that there was light from electricity where deceased was lying although spotlight was used. Although C.I. Erastus Gitari arrived at the scene after the crusade had ended and the scene deserted, he testified that the area where the deceased was lying was lighted by security lights from a neighbouring house. According to Appolo, the deceased was assaulted three steps behind him and that he recognized the two appellants with whom he grew up together as some of the assailants.

The trial Judge made a finding that there was sufficient light which illuminated the area at the time of the assault.

On our reconsideration of the evidence, we are satisfied that although the scene of the assault was not brightly illuminated by light from electricity, the lighting was sufficient for a person very close to the scene to recognize persons he knew very well before. Thus, we have no doubt that the lighting was sufficient for Appolo who was very close to the scene to recognize the two appellants with whom he grew up.

However, the credibility of Appolo has been questioned. Mr. Mutitu submitted that Appolo gave unreliable and contradictory evidence. Mr. Mutitu referred to some aspects of Appolo's conduct which according to him raises some doubts about his veracity such as leaving the scene of the assault immediately, failing to give the names of the appellant's to the deceased's parents whom he met as he was leaving the scene, and declining to testify until the court assured him of his security. At the trial, Appolo admitted that he was a member of Mungiki and had dreadlocks (Rasta) at the time the deceased was assaulted. He claimed that he shaved the dreadlocks and ceased to be a member of Mungiki in 2003.

It was suggested to him at the trial by the appellant's counsel then on record that he was the "*Rasta*" who was mentioned by witnesses as one of the persons who assaulted the deceased but he denied it. According to him the deceased was assaulted by the two appellants and a "*Rasta*" whom he did not know.

According to him he left the scene immediately for fear of being confused with the "*Rasta*" who had assaulted the deceased. The trial Judge took into account the demeanour of witnesses including Appolo and believed their evidence. The appellants were represented by counsel at the trial and it was not shown that Appolo's testimony was inconsistent with the statement he gave the police or that he had a motive for implicating the two appellants in the assault.

Indeed his evidence is consistent with the evidence of Paul, James and John as concerns the involvement of the first appellant and also consistent with the evidence of deceased's parents (Teresia and Benson); the evidence of Stephen and C.I. Erastus Gitari as regards the involvement of the second appellant. According to the evidence of Teresia, Benson and C.I. Erastus Gitari, the second appellant reported to the police that he had been assaulted by the deceased. According to Stephen, the second appellant reported to him that he had been stabbed with a knife at a crusade after a commotion. The evidence of Appolo is also consistent with the evidence of James who testified that he had seen the first and second appellants earlier in the day walking about at the village. In the light of the evidence, there is no basis for interfering with the finding of the trial Judge that Appolo was a credible witness and we are satisfied that he recognized the two appellants as some of the persons who fatally assaulted the deceased.

It has been submitted that the trial Judge erred in finding that the deceased made a dying declaration as the evidence is doubtful. There was however, ample evidence that the deceased was conscious after the assault and that he gave the names of the assailants, first to Paul, James and John immediately they arrived at the scene and later to his parents, Teresia and Benson.

The trial Judge considered the evidence and said:

“In the present case, this court has warned itself of the danger of relying on the evidence of dying declaration without sufficient corroboration. There is no doubt the five witnesses mentioned above heard the deceased mention the names of the two accused persons, among others, as being among the group. However, this Court has taken cognizance of the fact that it was at night. Although there was sufficient light which illuminated the area at the time of the assault, it cannot be said with certainty that the deceased was able to identify the assailants. However, the prosecution adduced evidence which sufficiently corroborated the evidence of the dying declaration of the deceased. The corroboration was offered by the evidence of PW1, PW2 and PW5 who saw the first accused call the accused aside a few minutes before the deceased was found lying on the ground having been stabbed and assaulted”.

The trial Judge found further corroboration of the dying declaration from the evidence of Stephen and P.C. David Mbugua (PW8) that the second appellant reported to them that he was assaulted at the crusade.

There is no doubt that the trial Judge directed himself correctly in law on the evidentiary value of a dying declaration and correctly looked for and found corroborative evidence. In addition to the corroborative evidence relied on by the trial Judge, there was further corroboration of the dying declaration in the evidence of Appolo. Further the evidence of C.I. Erastus Gitari that Benson upon finding the 2nd appellant at the police station immediately pointed him out as a suspect and that Benson told him that the deceased had given him the names of the assailants and further the arrest of the first appellant and the third person on the same night lends credence to the evidence of Benson that the deceased made a dying declaration. We find, like the trial Judge that the deceased made a dying declaration which was sufficiently corroborated.

The 2nd appellant’s alibi is rebutted by the evidence of Appolo, the dying declaration, the report by appellant to Stephen that he was assaulted at the crusade, the evidence of C.I. Erastus Gitari that the 2nd appellant reported to him that he was assaulted by the deceased and by the evidence of the 2nd appellant that he was in the vicinity – Gatongu centre.

In the final analysis we are satisfied that the appellants were convicted on overwhelming evidence. Accordingly, the appeal of each appellant is dismissed in its entirety.

Dated and delivered at Nakuru this 2nd day of October, 2009.

R. S. C. OMOLO

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.