REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

CRIMINAL APPEAL 36 OF 2008

ADBULHAKIM MOHAMED HASSAN HUSSEIN.....APPELLANT

AND

REPUBLIC.....RESPONDENT

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

(Ombija, J.) dated 26th March, 2008

in

H.C.Cr. C. No. 196 of 2003)

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JUDGMENT OF THE COURT

Abdulhakim Mohamed Hassan Hussein, the appellant herein was arraigned in the superior court with the offence of murder contrary to ***section 203*** as read with ***section 205*** of the Penal Code. The facts of the offence were that on the 1st day of April, 2003 at Ushirika Estate Nairobi within Nairobi area murdered ***Francis Wario***, the deceased. The prosecution called a total of 6 witnesses. ***Evans Mwangi Wanganga*** (PW1) ran a kiosk business during the period of the incident at Ushirika Estate Pangani. He was at his kiosk on 1st April, 2003 at around 8.00 p.m. when the appellant came there with two other people and asked to buy cigarettes but he told them he did not sell cigarettes. The appellant was not happy when PW1 told him this and he challenged PW1 to a duel but the two boys who were with him pulled him away. But soon after the appellant and his friends left PW1 heard a shout of "***thief, thief"*** and went out and stood near an electric post to check what was happening. He saw the deceased running away, but was then approached by some Somali people with whom he pleaded that he was not a thief; adding that the person he had disagreed with wanted to beat him. He was then escorted by the Somali people towards the scene but they met the appellant who shouted at them in Somali language and the people escorting the deceased dispersed leaving the appellant and the deceased in the middle of the road where the two fought. Then PW1 saw an old man separate the two and they ran in different directions. An Asian national at house No. 287 at Ushirika Estate allowed the deceased into his compound. He then went to where PW1 was standing and told him that the deceased was lying in his compound unconscious. Two people then came and took the deceased by taxi to Kenyatta National Hospital. PW1 heard the following day that the deceased had died while undergoing treatment.

Sophia Wangechi Warui (PW2) and ***Jackline Maweje*** (PW3) were sister and mother of the deceased respectively. They were at home on 1st April, 2003 at 9.00 or 10.00 p.m. when three boys brought the deceased to the house at Pangani and said he had been beaten by other boys at Ushirika including one Ben. PW3 took the deceased to City Park Hospital and later to Kenyatta National Hospital where he was treated and discharged. The next day the deceased requested to be taken back to hospital and when PW2 took him to Kenyatta National Hospital he died before he was attended to. ***Pc. Julius Marete*** (PW4) received a report of the incident while at Pangani Police Station on 10th April, 2003 from PW3 and an aunt to the deceased. This witness issued postmortem forms to them and accompanied them to Kenyatta National Hospital mortuary where PW3 identified the deceased body to him. PW4 was also present at the City Mortuary on 11th April, 2003 when post mortem examination was performed on the deceased body by ***Dr. Jane Wasike Simiyu*** (PW6) who formed the opinion that the cause of the deceased's death was due to head injury due to a blunt trauma. ***Pc. Michael Temor*** (PW5) of Pangani Police Station was instructed by ***Sgt. Ortum*** to go and arrest the appellant at Pangani Wuna Estate on 5th April, 2003. He arrested and took him to Pangani Police station where evidence was recorded before the file was forwarded to the Attorney General's Chambers for the appellant to be charged.

The appellant denied the offence in a sworn statement and said that on 1st April, 2003 he was in company of three other people when they met the deceased who demanded a hat from him but when the appellant told him he had no hat, the deceased took a stone and threw it at the appellant and his friends. Then he ran away. The appellant and his friends followed him. They heard him telling some people ahead of them that he was not a thief. Apparently, the crowd had accosted him as he was running away. The appellant and his friends told the crowd who were beating him that the deceased was not a thief and the said people left him and the deceased went and sat on a bench in front of a shop. The appellant did not see the deceased after that date until he heard later that the deceased had died. The police came to arrest him from his house on 5th April, 2003 at 11.00 p.m. He denied the offence and said the evidence of PW1 was false. During cross-examination, he denied shouting that the deceased was a thief and repeated that the evidence of PW1 was false.

This being a first appeal it is the duty of this Court to re-evaluate and reconsider the evidence adduced in the superior court and to make its own conclusions thereon by virtue of ***section 361*** of the Criminal Procedure Code, of course – bearing in mind that this Court had no advantage of seeing or hearing the witnesses testify as the superior court did.

The prosecution case was dependent on the evidence of PW1. The superior court *(Ombija, J.)* said at the conclusion of its judgment:-

"***In my judgment, the evidence adduced by the prosecution is to the effect that there were two incidences one involved confrontation of the accused by a mob. The accused saved him when he told the mob that he was not a thief. The mob then dispersed. Two, involved a physical fight between the accused and the deceased. An Asian occupant of House No. 257 Ushirika gave shelter to the fleeing deceased. The deceased became unconscious. Two friends of the deceased summoned a taxi which took the deceased to the hospital. The deceased eventually passed on. Against that background, I am persuaded that the deceased died of injuries inflicted in the course of a fight with the accused.***

In the result, I am persuaded that the prosecution has proved its case beyond reasonable doubt that the accused beat the deceased for 20 minutes. His intention, in law, must be deemed to be that of causing death or grievous harm. Accused had knowledge that, his acts would cause death or grievous harm, but was indifferent whether death would be occasioned.

In the circumstances malice aforethought was proved. Act-reus was equally proved. Both mens rea and actus reus was thus proved. The offence disclosed is thus murder contrary to **section 203** ***as read with*** *section 204* ***of the Penal Code.***

Although all the assessors returned a verdict of *NOT GUILTY*, ***I have the misfortune of disagreeing with them. It appears to me that they failed to comprehend the actions of the accused in relation to the***

concept of malice aforethought as defined in section 206 of the Penal code and *(sic)* ***explained to them during the summing up.***

In the result, I find that the prosecution has proved its case against the accused beyond any reasonable doubt. Accordingly I convict the accused as charged. I sentence the accused to suffer death as provided by law."

This is the decision the appellant was aggrieved with and which prompted him to lodge this appeal to this Court through his home made memorandum of appeal on 8th April, 2008. It had 5 grounds of appeal, namely:-

"***1. That the learned Judge fell into error in law by failing to analyze and reevaluate the tabled evidence.***

(i) Did not establish the alleged motive for murder.

(ii) Revolved on an instant provocation as adduced by PW1 thus short of proof to base such mandatory conviction.

(iii) Was marred by contradiction sufficient to shake the prosecution case.

2. That the learned Judge misdirected in law by failing to resolve the provision of *section 72(3)(b)* ***of the constitution.***

3. That the alleged charges of murder advanced against me fell short of proof demanded in the velocity *(sic).*

4. That my alibi offered in defence escaped a thorough analysis hence rejection a misdirection *perse section 169 C.P.C.*

5. That I pray to be furnished with certified trial record and be present in court when appeal hearing is due.

The appeal was heard on 5th October, 2009 when ***Mr. Kwengu***, learned counsel for the appellant submitted before us on the basis of the memorandum of appeal drawn by the appellant that the evidence adduced against the appellant was not scrutinized and the motive of murder was not established, and that the evidence attributed to PW1 that the appellant fought with the deceased could not be correct because the same PW1 stated that it was the appellant who spoke to the mob which had accosted the deceased and told them he – the deceased, was not a thief for them to leave him alone. He further submitted that the prosecution case was so weak it could not sustain the appellant's conviction. He complained that the taxi man who took the deceased to the hospital and the Asian man who sheltered the deceased were not called to testify and that it was not clear what could have happened to the deceased after he was treated and discharged from Kenyatta National Hospital on 1st April, 2003. He also complained about the failure by the superior court to consider the defence case. According to him, there was no direct evidence as to how the deceased received the injuries from which he died or that they were inflicted by the appellant.

Counsel also complained about breach of the appellant's constitutional rights in that there was a delay in presenting the appellant to the superior court for plea. ***Mr. Kaigai,*** learned Principal State Counsel opposed the appeal and submitted that there was overwhelming evidence to disclose the offence of manslaughter against the appellant. According to him the Judge of the superior Court saw and heard PW1 testify and he found him truthful. That the appellant shouted "*Thief*" against *(about)* the appellant and this is what attracted the mob to attack him. PW1 also saw the two fighting. The Principal State Counsel submitted further that PW1 testified not because of the alleged grudge he had against the appellant.

On the complaint regarding the breach of the appellant's constitutional rights, it is true that although the

appellant was arrested on 5th April, 2003, he was not presented before the Court for plea until 14th October, 2003 and that indeed the information on record herein and dated 24th September, 2003 was intended for committal proceedings. But we are aware that by then the law had been amended in July, 2003 to remove the process of committal proceedings. This notwithstanding, from the first date of the appellant's appearance in the superior court on 14th October, 2003, he was represented by an advocate called ***Mose*** who raised no issue of constitutional breaches which he must have been aware of. We wish to say no more about this complaint.

Another important issue in the case against the appellant was that of identification by PW1. He was the sole identifying witness. He testified that

"***About 20 minutes later I heard a shout. I recognized the voice of Hakim. He shouted (****Mwizi, Mwizi****) i.e. thief, thief. I walked out of the kiosk and stood by an electric post. I had (****sic****) the deceased by name Frank running very fast. While running Francis was approached by some Somali people. He pleaded that he was not a thief. He explained that the person he had a disagreement with wanted to beat him. He asked them to go to the scene to ascertain their feat (****sic****) that he was not a thief. He was being escorted by a mob of Somali nationals. The mob met with Hakim Hakim then shouted in Somali Language. The group dispersed and the two of them were left in the middle of the road where they fought. An old-man separated the two. Hakim ran to right of my kiosk. The deceased ran to the left of the place I was standing."***

On identification by voice this Court said this in the case of ***Libambula v R. [2003] KLR 683*** at page ***686***.

"***Normally, evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances, carry as much weight as visual identification. In receiving such evidence, care would be necessary to ensure that it was the accused person's voice, the witness was familiar with it and recognized it and that conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who said it."***

In the case giving rise to this appeal PW1 said during cross-examination:-

"***Deceased and accused are my customers"***

And during re-examination he said

"***Both deceased and accused were my friends."***

The evidence of PW1 against the appellant was that of a person he knew hence it was one of recognition rather than identification. And this was the evidence upon which the conviction of the appellant was based. There is no doubt the offence was committed at night and that PW1 went out of the kiosk and stood at an electric pole from where he alleges he saw what was going on.

As was said in ***Ogeto v. Republic [2004] KLR. 14***

'***It is trite law that a fact may be proved by the evidence of a single witness although there is need to test with the greatest care the identification evidence of such a witness especially when it is shown that conditions favouring the identification were difficult. Further the court has to bear in mind that it is possible for a witness to be honest but to be mistaken."***

This was the test applied in ***Abdalla Bin Wendo & Another v. R (1953) 20 EACA 166*** and also in the English case of ***R v. Turnbull [1976] 3 WLR 445*** as follows:-

"***How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a procession of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused?***

In the case giving rise to this appeal PW1 stood at an electric post from where he saw the deceased running fast. PW1 said that there was security light there. Then he saw the deceased run into a mob who apprehended him and took him back towards where the shout "*thief*" he had heard came from but the mob met the appellant who shouted at them in Somali language. The mob left the deceased and ran away.

In his evidence PW1 testified that he had seen the deceased running away very fast and when he was caught by the Somali nationals he pleaded that he was not a thief. There must have been a reason why he made this plea.

This must have been the reason why PW1 testified that when the appellant shouted at the crowd it dispersed. With that evidence on record which the learned Judge accepted in his judgment and the evidence of PW1 that the appellant and the deceased then remained in the middle of the road fighting and that they fought for 20 minutes shows the circumstances which led to the deceased death. This was supported by the postmortem report prepared by PW6. The learned Judge believed the evidence of PW1 which he found credible. If this is so then the learned Judge took the view that the deceased died as a result of the fight between him and the appellant.

In ***Republic v Oyier [1985] KLR 553*** this Court held that:-

"***The first appellate court cannot interfere with the findings by the lower court which are based on the credibility of witnesses unless no reasonable tribunal could make such findings or it was shown that the trial Magistrate erred in his findings or that he acted on wrong principles."***

In consideration of this authority and the evidence of what PW1 saw when standing at the electricity post, we agree with the submission of ***Mr. Kaigai***, Principal State Counsel that the evidence adduced was overwhelming against the appellant on the offence of manslaughter as the deceased's death occurred as a result of injuries sustained in the fight between him and the appellant. In the result we would set aside the appellant's conviction and sentence on the offence of murder contrary to ***section 203*** as read with ***section 204*** of the Penal Code and substitute therefor one of manslaughter contrary to ***section 202*** as read with ***section 205*** of the Penal Code. While setting aside the death sentence we substitute it with a sentence of 8 years imprisonment from the date of conviction. These shall be the orders of this Court.

Delivered and dated at Nairobi this 20th day of November, 2009.

E. M. GITHINJI

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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