REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT MOMBASA

Criminal Appeal 375 of 2006

KENGA CHEA THOYA ……..……...……. APPELLANT

AND

REPUBLIC ……...…….. RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Malindi (Ouko, J) dated 28th July, 2005 In H.C. Cr. Case No. 19 of 2004)

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JUDGMENT OF THE COURT

On the 9th December, 2004, KENGA CHEA THOYA was arraigned before the High Court of Kenya at Malindi on a charge of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence read as follows:-

"KENGA CHEA THOYA: On the 17th day of October, 2004 at Gede village, Gede sublocation, Mtangani location, Kilifi District of the Coast Province murdered KAUCHI KATANA KITOO."

When the charge was read and explained to the appellant, he pleaded "Not Guilty". He was accordingly remanded in custody to await his trial which eventually commenced on 9th March, 2005 before Ouko Ag. J. (as he then was) sitting with three assessors. The prosecution called six witnesses.

The evidence of Saumu Karisa Katana (PW 1) was that on the material day (17th October, 2004) at about 9.00 a.m. while walking to church with the deceased (Kauchi Katana Kitoo) they were confronted by the appellant, who emerged from a thicket. The appellant ordered the deceased, who was his estranged wife, to give to the witness (PW 1) the child she (the deceased) was carrying. When the deceased did not respond immediately, the appellant began to cut her with a panga. On seeing what was happening, Saumu ran to her mother Mwenda Karisa Katana (PW 2) who was walking behind them. When Mwenda got to the scene, the deceased was already dead with Saumu's child strapped on her back. Mwenda unstrapped the child and returned home leaving the deceased's body at the scene. Mwenda informed her husband who in turn went to make a report to the area Assistant Chief Charo Koto (PW 3). The Assistant Chief informed the appellant's brother about the incident and the brother Changawa Cheya (PW 4) undertook to look for the appellant. On the fourth day after the incident at 3.00 a.m., the appellant went to his brother's (PW 4's) house where Changawa persuaded the appellant to go with him to the police station where the appellant was arrested.

On 29th October, 2006 Dr. Eric Mutiso (PW 5) conducted postmortem examination on the body of the

deceased. In the course of his evidence in chief Dr. Mutiso testified, *inter alia*, as follows:-

"**There were 2 injuries on the head - deep laceration on the skull with compound fracture of the skull. The second injuries were on the limbs – left hand was almost amputated and lacerations on the right hand.**

Death was caused by:

i) Severe brain injury

ii) Fatal hemorrhage from the cut wounds on the wrist."

Lastly, there was the evidence of Pc Daniel Kirwa (PW 6) of Kilifi Police Station who received the report about this incident and as a result proceeded to the scene which was about 150 Kilometres from Kilifi Police Station. Pc Kirwa collected the body of the deceased and took it to the mortuary. After investigations and recording of statements from the witnesses, Pc Kirwa charged the appellant with the offence of murder.

When put to his defence, the appellant elected to make an unsworn statement in which he stated that on 16th October, 2004 which was a day prior to the incident, he had gone to the forest to collect timber which was to be picked up by a lorry on a Monday. He returned home on a Tuesday only to find his family in a state of worry as the Assistant Chief had gone to his home to look for him in connection with the murder of the deceased. He went to his brother who clarified why he was being sought by the Assistant Chief. His brother took him to the police station where he was arrested and charged with the offence.

After summing up the evidence and the law to the assessors by the learned trial Judge, the first and second assessors returned an opinion of guilty while the third assessor reasoned that the appellant, having separated from the deceased who was an aunt to PW 1, the latter told the court falsehood due to bad blood.

The learned Judge duly considered the evidence adduced by both the prosecution and the defence as well as the submissions by counsel appearing for both sides and came to the conclusion that the appellant was guilty as charged and proceeded to sentence him to death as prescribed by law. In the course of his judgment the learned Judge stated:-

"**The incident took place at about 9.00 a.m. The accused was well known to the witness having been married to the deceased, who was an aunt to the witness. The accused also lived in an (sic) nearby home to that of the witness. The witness, in my opinion had sufficient opportunity to see the accused. The conditions for identification were favourable. It was in the morning at 9 a.m. and present at the scene were only the deceased, the accused, the witness and two toddlers who were being carried by the witness and deceased.**

The accused was known to the witness prior to the incident. The witness was able to recognize him. There could not have been any mistake on the part of the witness as to the identity of her aunt's assailant.

The accused raised a defence of alibi. In the light of what I have stated above, that defence cannot be available to the accused. The prosecution has tendered sufficient evidence to negate that defence. It is unreliable and untrue. I find that the accused was responsible for the fatal injuries inflicted on the deceased.

The accused person armed himself with a panga and laid an ambush for the deceased his wife, from whom he had been separated. The nature of injuries on the body of the deceased, particularly

on the head and hands point to the fact that he struck her several times. This can only mean that he intended to cause her death."

It is from the foregoing that the appellant now comes to this Court by way of a first appeal and through his advocates, Marende Birir & Company Advocates, a supplementary Memorandum of Appeal was filed setting out the following grounds of appeal:-

"**1. The Learned Judge erred in Law and fact by relying on the evidence of PW 1 without corroborative evidence whose age is not ascertained.**

2. The Learned Judge erred in Law and fact in dismissing the Appellant's alibi without evidence disproving it.

3. The Learned judge erred infact (sic) by failing to find that the investigations were shoddy, clumsy and inept and that on that basis, conviction was certainly unattainable.

4. The Learned judge erred in law by failing to find that the prosecution's failure to open its case at the beginning of the proceedings occasioned grave miscarriage of justice to the appellant.

5. The Learned judge erred in fact when he found that the Appellant surreptitiously sneaked into the house when there was no evidence by PW 4 if he ever saw him on the day of murder."

When this appeal came up for hearing before us on 24th July, 2007 Mr. K. Ng'eno appeared for the appellant while Mr. V. S. Monda (State Counsel) appeared for the State. In his submissions, Mr. Ng'eno faulted the learned Judge for relying on the evidence of PW 1 which was not corroborated. He went on to argue that the prosecution case was riddled with contradictory evidence making it unsafe on which to base a conviction of the appellant. He complained that investigations were not properly done as the body of the deceased was collected three days after the incident. Lastly, Mr. Ng'eno faulted the procedure adopted during the trial in that there was no opening address as provided by **section 300** of the Criminal Procedure Code. He relied on the decision of **Wanja Kanyoro Kamau v. Republic [1965] E.A 501**.

On his part, Mr. Monda supported both the conviction and sentence maintaining that the evidence of PW 1 put the appellant at the scene of crime and that PW 1 was emphatic in her evidence that it was the appellant who killed the deceased. Mr. Monda pointed out that the conditions prevailing were favourable for a positive identification. He ruled out the issue of mistaken identity.

Mr. Monda argued that the appellant's defence of *alibi* was properly considered by the learned Judge who rejected it.

As regards **section 300** of the Criminal Procedure Code, Mr. Monda submitted that the provision is merely directory and that the appellant was not prejudiced merely by the fact that there was no opening address.

This being a first appeal, the appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to have this Court's own decision on the evidence. In **Mwangi v. Republic [2004] 2 KLR 28 at p. 30** this Court said:-

"**In *Okeno v R* [1972] EA 32 at p 36 the predecessor of this Court stated, *inter alia*:-**

"**An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v R* [1975] EA 336). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v Sunday Post* [1958] EA 424.""**

Proceeding in accordance with what is stated above, we have already given the summary of the evidence adduced before the trial court. The incident took place at about 9.00 a.m. The key witness was Saumu Karisa Katana (PW 1) whose testimony was as follows:-

"**On 17th October, 2004 at about 9 a.m. we were going to church with my mother, Mwenda and the deceased. I was carrying a baby – my brother. The deceased was carrying my baby. On the way, the accused appeared from the bush. He was carrying a panga. He ordered the deceased to give the baby to me.**

The baby was strapped on the deceased back. He repeated. When the deceased hesitated the accused began to cut the deceased with a panga. He cut her once and I ran away. I ran backwards to my mother and told her to go and take my child as the accused was attacking the deceased. My mother ran and removed the child from the deceased back (sic). Accused had disappeared by the time my mother arrived. When my mother arrived the deceased had died. People came. They included my father, uncle and my grandmother. The body remained at the scene for 2 days. The 3rd day the police collected it. The deceased and the accused were married but they were not living together. They had separated for a long time. They did not have a child."

It was argued by Mr. Ng'eno that the learned Judge erred in law and fact by relying on the evidence of PW 1 without corroboration. We were not able to follow this argument since, in our view, the evidence of PW 1 did not, as a matter of law, require any corroboration. PW 1 was described as an adult female. She testified as regards the incident that took place at about 9.00 a.m. As we know, a fact may be proved by the testimony of a single witness – see **Abdallah Bin Wendo v. R. (1953) 20 EACA 166**.

An issue was raised as regards the age of PW 1 but as we have already stated, she was not a minor as she was described as a female adult. Even from the record she was not only a female adult but a mother. We therefore find no merit in the first ground of the supplementary memorandum of appeal.

The second ground was to the effect that the appellant's *alibi* was dismissed without evidence disproving it. We have already set out how the learned Judge considered the defence of *alibi* which he rejected. In our view, the learned Judge was perfectly entitled to reject that defence of *alibi* in view of very clear evidence from PW 1 and PW 2 who clearly recognised the appellant at the scene of crime.

It was submitted on behalf of the appellant that the investigations were "shoddy, clumsy and inept and that on that basis, conviction was certainly unattainable". It is true that it took about three days for the police to reach the scene of crime. But it was in evidence that the scene of crime was 150 kilometres from Kilifi Police Station and that the first attempt by the police officers from that police station to reach the scene was thwarted by the state of the roads which were impassable. This was clearly beyond the control of the police who were investigating the matter. However, in the end the police reached the scene, collected the body and took it to the mortuary. The police carried out the investigations by interviewing the witnesses and recording their statements. In our view, investigations might have been slow but there were genuine reasons for this as we have already pointed out.

There was the complaint that there was no opening address by the prosecution. But on this issue we would agree with Mr. Monda that **section 300** of the Criminal Procedure Code is merely directory. In our view, the appellant was not in any way prejudiced by the fact that there was no opening address by the prosecution. Indeed in **Kamau v. R** (supra) Spry, J.A said:-

"**We would emphasise that, in our opinion, prosecuting counsel when opening should avoid any reference to evidence the admissibility of which is open to challenge, particularly confessions. Indeed, in the circumstances of East Africa today, where the evidence given at trials is often materially different from that given at the preliminary inquiries, we think it advisable, as a general rule, that opening addresses in criminal trials be limited to a statement of the basic facts which the prosecution expects to prove. This would obviate the danger of assessors confusing counsel's statement of the evidence to be called with the evidence itself."**

The cited authority sets out how the opening address should be made and it does not say that the opening address must be made. We find no merit in that ground.

On our own re-evaluation of the evidence, we find this to be a straightforward case in which the appellant was recognized by the witness (PW 1) who knew him. This was clearly a case of recognition rather than identification and as it has been observed severally by this Court, recognition is more satisfactory, more assuring and more reliable than identification of a stranger – see **Anjononi v. Republic [1980] KLR 59**.

The evidence adduced clearly established that the appellant armed himself with a panga and laid an ambush for the deceased who was his former wife from whom he had separated. The nature of the injuries inflicted on the deceased point to the fact that whoever inflicted those injuries (the appellant in this case) intended to cause death.

Having considered the submissions by counsel appearing for both sides, we are of the view that the appellant was convicted on very sound evidence. We accordingly order that this appeal be and is hereby dismissed.

Dated and delivered at Mombasa this 18th day of January, 2008.

P.K. TUNOI

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JUDGE OF APPEAL

S.E.O BOSIRE

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR