



IN THE COURT OF APPEAL

AT NAIROBI

CRIMINAL APPEAL NO. 43 OF 2006

MUTUA MUTISYAAPPELLANT

AND

REPUBLICRESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nairobi (R.V. Wendoh) dated 16th January 2006

in

H.C.Cr.A. No. 35 of 2003)

JUDGMENT OF THE COURT

The appellant, **Mutua Mutisya**, was convicted by the High Court sitting in Machakos (R.V. Wendoh J.) for the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code. It was alleged that on the 5th day of October 2002 at Bondeni village Utithi Location in Makueni District of Eastern Province he murdered Maggy Meki Mutua.

Upon his conviction, the mandatory death sentence was meted out to him and he now comes to us on this appeal.

In his memorandum of appeal which he drew up in person he listed six grounds of appeal which counsel who appeared for him, Mr. D. G. Wachira did not say anything about but instead filed a supplementary memorandum of appeal, as he was entitled to do, under rule 64(2) of the Rules of this Court.

The grounds are that:

- “1.The learned Judge of the superior court misdirected herself on essential ingredients of the offence of murder contrary to section 203 as read with section 204 of the Penal Code.**
- 2. The learned Judge of the superior court misdirected herself in drawing inference of malice aforethought without any evidence to support the said inference.**
- 3. The learned Judge of the superior court misdirected herself in finding that the appellant had caused the injuries in the postmortem report in the absence of evidence that it was the appellant who inflicted the specific injuries that caused the death of the deceased.**

4. The learned Judge of the superior court misdirected herself in finding that the appellant had inflicted the injuries that caused the death of the deceased in absence of excluding the possibility of deceased suffering other injuries between 8th October 2002 when the deceased left the appellant's home and the date of death.

5. The learned Judge of the superior court misdirected herself in finding that the appellant did not produce medical evidence to show that the deceased had suffered from a disease of vomiting blood notwithstanding the failure of the investigating officer to give evidence thereby shifting the burden of proof to the appellant.

6. The prosecution failed to call essential witnesses particularly the investigating officer.”

We shall revert to these grounds of appeal shortly. But what were the facts of the case accepted by the superior court?

The appellant was the deceased husband. On 5th October 2002 at about 7.00 p.m. he came home from the market. He asked the deceased to warm some water for him to bathe. She failed to do so and he beat her up.

Three days later the deceased left home to go to her parents. She died there on 15th October 2002 and the appellant was arrested and charged with this offence.

The case in the superior court was founded on the evidence of five witnesses. The evidence of Sabeth Kalondu Mutisya (PW1) was that she visited the deceased home on 6th October 2002 and when she reached there the deceased informed her that she had been beaten by her husband (the appellant herein).

That the deceased even asked PW1 to assist her go to the latrine as she could not do so on her own. The witness observed that the deceased was swollen on the face, right side of the head and hips.

Kambua Mutua (PW4) is the daughter of the deceased and the appellant. She was at home on the day of the incident. She heard when the appellant told the deceased to warm some water for him but did not hear what the deceased reply was. The appellant then took a stick from outside and hit the deceased with it on the legs.

Esther Mutunga Mwinzi (PW2) and Kivindu Mwangangi (PW3) also testified in the case but their evidence merely alluded to the screams they heard from the appellant's home on 5th October 2002 at either 7.00 p.m. or 8.00 p.m. and how they went to his gate or fence and called out to the appellant to stop beating up the deceased. He did not reply to their calls.

The evidence of Mboka Mutua (PW5), another child of the appellant, was not of any consequence to the case either as he was looking after cattle when the incident occurred except that he escorted the deceased to his grandmother's home on 8th October 2002.

No. 51645 Pc. Isaac Wanyoike (PW6) testified as to how he witnessed the post-mortem examination on the body of the deceased at Makindu Hospital on 22nd October 2002, while Dr. Richard Onkware (PW7) gave details of the post-mortem examination report prepared by Dr. Salim who was no longer working in Kenya.

In his sworn defence the appellant testified that on 5th October 2002 he had woken up in the morning and left at 9.00 a.m. to go to the market where he was to buy some cows.

He came back home at about 4.00 p.m. to 5.00 p.m. and was tired. He told the deceased to boil some water for him to bathe but she spoke to him rudely.

But when he asked her what was wrong and yet when he left home in the morning she was alright, she

told him she was not going to boil the water for him.

That he asked her why she could not boil the water for him but she got up and came towards him in a very angry mood but he pushed her backwards.

She asked the appellant why he had pushed her, and took a stick from the sitting room and hit him with it. Then she again bit his thumb.

He testified further that he told the deceased that if there was anything wrong the two could sit down and talk. Then he took the stick and whipped her on her legs.

That after the incident the two sat down and talked over it and forgave one another, then she gave him food to eat.

He did not leave home on 6th and 7th October 2002 and that everything was alright. On 8th October he left home to go and purchase some cows. He did not say where. He must have gone far because he came back on 14th October 2002 but did not find the deceased at home. Children were alone and said the deceased had gone to her parent's home in Masaku Ndoko, which was a normal thing for her to do.

According to his evidence, the deceased was suffering from a disease where one vomits blood and that he had taken her to hospital at Machakos where X-ray was done.

Then he took her back to Makindu where she was admitted on 7th June 1998.

He further testified that on 15th (he must have meant 15th October 2002) his brother called Kimanthi Mutisya and a neighbour called Mulatia Muthike came to his home and told him that the deceased had passed away. That she had started vomiting and then she died.

He concluded that he was not responsible for the death of the deceased because she died as a result of that sickness.

After the appellant testified, the Judge summed up the case on 13th January 2005 for the assessors to return their verdict and they did return a unanimous verdict of manslaughter against the appellant.

The Judge then wrote her judgment in which she set out the prosecution case and that of the appellant in great details which she delivered on 16th day of January 2006. She said at the end of it:-

“The deceased died after about two days. There is no evidence that she ever attended any doctor for treatment. The accused does admit only whipping the deceased on her legs but denies knowing where the other injuries found on the deceased body came from. PW4 also said she only saw the father whip the mother on the legs and no more. The question is whether the deceased sustained injuries on the rest of the body after she left her home.”

PW1 told the court that one of the deceased's children went to inform her that the deceased had been beaten and she went to visit her. PW1 said this was on 5th October 2002 but I doubt that the date is correct. This is because the beating took place on 5th October 2002 at about 7.00 p.m.

PW 1 said that on getting the news, she slept once and went to see the deceased only to find the deceased swollen on the head, face and hips and unable to walk. The deceased told PW1 that she was beaten by her husband. He was not present in the home then. PW1 visited the deceased while in her husband's home. She was already seriously injured. PW1 even helped her to the toilet. PW1's evidence was never challenged and I do find that the injuries found on the deceased by the doctor were inflicted on the deceased while in the deceased's (she must have intended to say “accused”) home and they must have been inflicted by the accused because PW1 visited after the beating. PW4 and accused were not truthful to say that the deceased was only whipped on the legs.

It was the responsibility of the accused to take the deceased to hospital. He did not. Instead he claims to have left her home for a journey. That must have been what prompted the deceased to ask her children to take her to her parents home where she later died. It is noteworthy that even when accused says that he returned from his journey he had not gone to seek his wife. In his defence the accused claims that his wife suffered from a disease of vomiting blood for which she had been treated severally but produced no medical evidence to that effect. Besides that alleged illness came up as an afterthought in his defence when he had a chance to have the witnesses and even the Doctor cross-examined on the issue of the disease. Accused was obviously not truthful. The allegation of the disease is an afterthought and a falsehood.

From the evidence of accused and PW4 the only two present when the incident occurred accused was provoked by the wife's refusal to boil for him water to bathe. The accused then went ahead to beat her inflicting very serious injuries. In fact the injuries as per the doctor's report were all over the body; bruises on the body, haematoma on the left thigh, back and left eye, clotted blood on ears and nose, large dent on the left parietal area of the head haematoma on the left parietal and vertex areas, cut with blood oozing on the vagina. Even if provoked it seems the accused beat up the deceased recklessly not considering where he hit her and he must have done it several times and aimed at vital parts of the body that were fatal. In addition to this he refused and neglected to take the deceased for any medical treatment and in my view malice aforethought does flow from the injuries inflicted and accused conduct thereafter. He meant to end the deceased life. I beg to differ with assessors' finding that it was manslaughter because it arose out of a domestic quarrel. I am convinced beyond any doubt that the accused had the intention to kill the deceased and executed it and will find him guilty of the charge of murder contrary to section 203 as read with section 204 Penal Code and convict him of that charge."

Underlining supplied.

It is against this conviction that this appeal is before us.

When counsel for the appellant Mr. Wachira rose to address us on this appeal and, on being asked by the Court whether he thought this was really a case of murder, he chose to narrow the issues and not to address us on the grounds of appeal as set out in the supplementary memorandum of appeal.

He submitted that there was an argument between the appellant and the deceased and a long stick was used to beat her but he was not certain this stick inflicted on her all the injuries shown in the post-mortem report and wondered when and where these other injuries were inflicted on the deceased.

Counsel said that the investigating officer, who did not attend to testify in the case, should have done so in order to shade some light on these fresh injuries.

He submitted that the learned Judge misdirected herself in shifting the burden of proof when she stated the appellant should have adduced medical evidence of the deceased treatment.

It was Mr. Wachira's contention that the evidence did not prove the offence of murder but may be of manslaughter or simple assault as the beating attributed to the appellant on the deceased was not thorough.

Counsel for the State, Mr. Kivihya, submitted that the chain of evidence was not complete and that he was ready to concede to a manslaughter charge.

In his view the appellant assaulted his wife and that the beatings were thorough thus prompting neighbours to come to intervene.

This is a first and final appeal and this Court has a duty to reconsider the evidence which was adduced before the superior court, evaluate it and draw its own conclusions giving due allowance for the fact that it has neither seen nor heard the witnesses. – see **Ogeto v. Republic [2004]2 KLR 14, Okeno v.**

Republic [1972] E.A. 32 and Ngui v. Republic [1984] KLR 729.

Nevertheless a Court of Appeal will not normally interfere with findings of fact by the trial court, unless they are based on no evidence or misapprehension of the evidence, or the trial Judge is shown demonstrably to have acted on wrong principles in reaching the decision – **Chemagong v. Republic [1984] KLR 611** and **Kiarie v. Republic [1984] KLR 739.**

The evidence really adduced in support of the charge against the appellant was that of a twelve year old girl, Kambua Mutua (PW4) the appellant's daughter. She testified that her father, the appellant, had come home from the market and asked the deceased to boil water for him. He did not hear what the deceased reply was. The appellant took a stick from outside and hit the deceased on the legs. She did not see anything else, though she said she cried when the appellant started beating the deceased.

According to her Mutunga and Kivindu came there and called on the appellant to stop beating the deceased.

Then her mother stayed for three days at home before she left to go to her parents leaving this witness at home.

Cross-examination of this witness was brief. She answered that she did not know where the appellant threw the stick and that it was not a stick but a piece of firewood.

What we gather from this evidence, which the Judge rejected as an afterthought and a falsehood, is that even the weapon used to beat up the deceased was not recovered and/or produced before the superior court.

But it is desirable that a weapon used for the commission of a crime be produced in court so as to assist in ascertaining if it was capable of inflicting an injury or injuries complained of.

But PW4 was a prosecution witness called to support the prosecution case to show how the deceased met her death. But with that evidence turning out to support the evidence of the appellant as to how the deceased was beaten and the same being rejected by the superior court, then without more, there was nothing left to show how the incident actually happened or occurred.

The evidence of Esther Mutunga Mwinzi (PW2) and Kivindu Mwangangi (PW3) was not of any help as the witnesses only reached the gate or fence of the appellant's home but did not enter the house to see what was going on except to hear screams which lasted only five minutes.

Then the Judge seems to have placed considerable weight on the evidence of Sabeth Kalondu Mutisya (PW1) as lending support to the injuries described in the post-mortem report by the doctor.

When she got the information that the deceased had been beaten she went to see her at home the next day. On reaching there and going inside the house, the deceased told her to assist her to go to the toilet which the witness did. According to her the deceased was swollen on the face, right side of the head and hips.

That she told the witness these injuries were inflicted upon her by the appellant.

But the post mortem report shows much more injuries than what PW1 observed or was told by the deceased. The deceased abdomen was swollen. It had bruises with bluish areas on the body.

There was a large dent on the left parietal area of the head and a dent on the left eye, laterally, about 3cm; there was clotted blood on ears and nose. haematoma on the left parietal area of the head and a cut on vagina interior and posterior where blood was oozing.

Apparently PW1 did not observe or was not told about most of these injuries if they were inflicted by the

appellant's beating most of which like clotted blood on ears and nose, bruises on the body and swollen abdomen could easily have been visible. The deceased would even have told PW1 about the vaginal injury but she did not.

Moreover, the deceased was assaulted on 5th October 2002 and she left home on 8th October 2002.

Mboka Mutua (PW5) said:

“I found my father gone to Kitui and my mother asked us to escort her to my grandmother's home. She was going to visit my grandfather.”

It is not clear with whom PW5 was when escorting the deceased to the home of his grandfather. She(he) did not tell the superior court the state of health of the deceased at the time.

It is not even clear if she went to her parents' home or that of her parents' in-laws. Nobody was called from whichever home she went to come and explain in what state of health she was when she arrived there.

It is even not clear if she died in that home or in which hospital. In re-examination PW1 said she heard the deceased was taken to Kyangwithya where she died after a week. There was no evidence to explain what or where Kyangwithya was or how and by whom her body was taken from there to Makindu Hospital for a post-mortem examination.

These were serious lapses on the part of the investigating officer who added insult to injury by not attending court to testify in this very serious case despite various adjournments granted to enable him to do so.

It is not even known as per the record of evidence which police officer arrested the appellant and from where and/or why the weapon used in beating the deceased was not recovered and produced in evidence.

If the investigating officer appeared in court he, no doubt, would have shed light on these important aspects of the case.

Another issue the learned Judge did not consider fully was the principle of law that in all criminal cases the burden remains on prosecution to prove its case against an accused person beyond any reasonable doubt – see **Mkendeshwo v. Republic [2002]1 KLR 461.**

And as a general rule the accused assumes no legal burden of establishing his innocence except in certain limited cases where the law places a burden on the accused person to explain matters which are peculiarly within his personal knowledge; - see **section 111** of the Evidence Act Chapter 80 Laws of Kenya; and also **Chemagong v. Republic (Ibid).**

But the case subject of this appeal was not in that category and when the learned Judge said in her judgment that:

“It was the responsibility of the accused to take deceased to hospital. He did not”.

or that

“In his defence the accused claims that his wife suffered from disease of vomiting blood for which she had been treated severally but produced no medical report to that effect”

She was in fact shifting the burden of proof to the appellant which, with due respect was an error of law on her part.

Another error of law the learned Judge committed is found in her judgment at page 7 where she said:

“In addition to this, he refused and neglected to take the deceased for any medical treatment and in my view malice aforethought does flow from the injuries inflicted and the accused conduct thereafter. He meant to end the deceased life.”

We feel there was absolutely no evidence as required by section 206 of the Penal Code to justify these conclusions.

And given that the deceased was assaulted on 5th October 2002, she left home on 8th October 2002 and died wherever she went on 15th October 2002, it would be difficult to be certain and link her death to the assault inflicted on her by the appellant.

If the learned Judge had considered all these matters and flaws in the evidence, a reasonable doubt would have been created in her mind, the benefit whereof should have been given to the appellant.

We are indebted to counsel for both parties who addressed us on this appeal and advanced the view that the evidence adduced in the superior court could have made out a case of manslaughter against the appellant but given our evaluation of that evidence and the errors of law committed by the learned Judge we are not convinced that even a charge of manslaughter against the appellant could stand.

We allow this appeal, quash the conviction, and set a side the sentence and order the release of the appellant from prison custody forthwith unless otherwise lawfully held.

Dated and delivered at Nairobi this 29th day of February 2008.

E. O. O’KUBASU

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JUDGE OF APPEAL

W. S. DEVERELL

.....

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