REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT MOMBASA

Criminal Appeal 108 2007

KALAMA MWARO NGALA …… APPELLANT

AND

REPUBLIC ……..…….. RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Mombasa (Khaminwa, J) dated 8th February, 2007

in

H.C. Criminal Case No. 45 of 2004)

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JUDGMENT OF THE COURT

Kalama Mwaro Ngala, the appellant, was tried on an information which charged him with the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code. The particulars of the information were that on the 7th day of September 2004 at about 10.45 a.m. at Utange, Pendua Village in Bamburi Location within Mombasa District of the Coast Province, he murdered Mwaro Ngala, the deceased.

The prosecution case before the superior court was that the deceased had four wives with a large homestead which comprised ten houses at Pendua Village. He had seven sons living at the material time and the appellant was one of them. On the day in question, Kadzo Mwaro Ngala (PW 1), one of the deceased's wives, was outside the deceased's elder son's house when she heard or saw the deceased screaming and saying in Kiswahili language – "*Rama unaniua*", translated in English would mean "Rama you are killing me". She saw Rama behind the deceased and he was holding a panga. She ran to a place where the deceased's sons, Charo (PW 2) and Adam (PW 3), were constructing a well and informed them of what she had seen. When she returned to the scene with PW 2 and PW 3, they found the deceased had fallen down and observed that he had cut wounds on the head and neck which were bleeding. The deceased was already dead. One Ponde reported the incident to No. 230270 C.I Mathew Juda (PW 5), OCS Bamburi Police Station. He was accompanied by No. 55607 Cpl. Charles Kazungu (PW 6) to the scene of the incident at Mkoroshoni area.

When the officers observed the body of the deceased, they were not sure if he was dead, they

collected the body with a view to take it to the Coast General Hospital but on reaching there he was pronounced dead. In the meantime, the appellant had gone to Bamburi Police Station and presented himself to an officer there called Mwagema who took him to the OCS with a report of an offence committed at Mkoroshoni. The appellant was holding a blood stained panga. He was placed in police cells and after the family members including PW 1, PW 2 and PW 3 recorded their statements, and a postmortem examination conducted on the deceased's body by Dr. Mandalya (PW 6), the appellant was charged with the offence subject to this appeal.

In his sworn defence, the appellant denied the offence and stated that at the time the incident occurred, he was at some bar within the village playing pool table and that he was only called by one of the deceased's workers called Waeza who told him he was urgently required at home. In fact, Waeza had come on a bicycle on which he carried the appellant back home. When he reached there, he found many people. He pushed through the crowd to reach the scene where the deceased's body lay. The deceased was bleeding through the mouth and nose. According to him, his brother Rama was around and he also saw a panga.

He stated that police came and collected the body and members of the family, including the appellant, to the Coast General Hospital where the body was left at the mortuary. The appellant and other family members who included PW 1, PW 2 and PW 3 were taken to Bamburi Police Station where they were questioned as to who had killed the deceased. They denied and were all placed in police cells. That later, all other members of the Mwaro family were set free except the appellant who remained and he was charged with this offence. He said he had never been given an opportunity to say anything in the case except when he defended himself before the superior court.

In a reserved judgment, the learned Judge (Khaminwa J.) said the following:

"**Upon cross-examination of the prosecution evidence and the sworn statement of the accused, it is my finding that the circumstances surrounding the commission of the offence point only to the accused as the person who went up the deceased (sic) and killed him. There was no one else around who can be pointed to. PW 1 was the younger wives (sic) of the deceased. She stated what she saw clearly. The statement of the accused is not true. The bar is not identified although it is said to be near home. It is true the accused has no burden to prove his innocence but his *alibi* is not supported by facts to having it into existence (sic). I do not believe it. On the issue of name "Rama" the person who was charged is the one pointed at by members of the family as the killer of his father, the deceased. There is no evidence or indication that there were any grudges among the members of the family. There is no reason therefore for them to implicate the accused, their brother. The assessors who assisted the court in this trial gave their opinion that they found the accused guilty of the offence as charged. I am not bound by their opinions, but it is my finding that the evidence presented by the prosecution proves beyond all doubt the accused committed the offence as charged. I convict him accordingly."**

Following the conviction, she sentenced him to death as provided by law.

This is the decision out of which this appeal before us has been filed. It is founded on the memorandum of appeal filed by the appellant in person. It listed 5 grounds of appeal namely:-

"**1. That the learned High Court Judge erred in law and facts in convicting me by relying on the evidence tendered by PW 1, PW 2, PW 3, PW 4 and PW 5 despite the fact that neither of them witnessed the person claimed to be killing the deceased.**

2. That the learned High Court Judge erred in law and facts in accepting the evidence of PW 1, PW 2 and PW 3 being the evidence of truth while their evidence and doubts due to the fact that(sic):

(a) PW 1 told the court that he did not know when the deceased died.

(b) PW 2 and PW 3 clearly admitted in cross-examination that they gave false information/evidence.

3. That the learned High Court Judge erred in law and facts by failing to note that the prosecution did not prove their case beyond reasonable doubt due to the following reasons:

(a) By not dusting the said exhibit panga for the elimination of finger prints.

(b) By failing to examine the blood stains found on the said panga and that of the deceased.

(c) PW 1, PW 2 and PW 3 heard the name of the person who was attacking the deceased as one Rama and not me Kalama Mwaro.

4. That the learned High Court Judge erred in law in convicting me without properly noting that the case was partly conducted in the absence of one assessor contrary to section 298 of the Penal Code.

5. That the learned High Court Judge erred in law and facts in failing to adequately consider my sworn offence (sic) which was reasonable enough to create doubt against the prosecution case."

Before us, J.O. Magolo, the learned counsel for the appellant, attacked the decision of the superior court on the manner the case was conducted and the sentence. He did not argue the appeal grounds one by one. In the first place, he submitted that although the case was conducted with the aid of assessors, at the conclusion thereof, opinions were received from only two of them and that even the assessors who gave their opinions were not properly chosen. The learned counsel submitted further that it was not clear if the appellant understood the entire proceedings because although Kiswahili was understood to be the language of the court, some witnesses testified in English language which the appellant did not follow. He also contended that although on 8th December 2005 the learned Judge had made an order that the case was to start *de novo*, this did not happen because she proceeded with the case on 13th June 2006 without revoking her earlier order which required the case to start *de novo*. The learned counsel stated that the person seen cutting the deceased with a panga was one Rama who was not the appellant, and that the learned Judge did not resolve the issue of who Rama was or that the witnesses could have mistaken the appellant for Rama, hence this should have raised a reasonable doubt in the mind of the superior court to entitle the appellant the benefit thereof.

Mr. J.N. Ondari, the learned Assistant Deputy Public Prosecutor, supported the appellant's conviction and the sentence imposed upon him because it was based on sound and credible evidence from the appellant's own relatives. According to him, the appellant was the person seen with the panga and standing near the deceased. He took himself to the police station with the panga.

On the question of assessors, the learned counsel said that they were properly selected and the language used throughout the proceedings was Kiswahili through a court clerk who acted as an interpreter. He stated that the appellant was represented by a lawyer at the trial who raised no issue with the language used. The learned counsel said that although the learned Judge had ordered that the case be started *de novo* thinking she would leave the station, this did not happen and so she continued hearing the case to its conclusion. He however said that should the appeal be allowed because of the record being messed up, then the Court should order a retrial.

This being a first and final appeal, this Court is obliged to review the evidence adduced in the superior court afresh in order to determine whether the conclusions reached upon that evidence should stand and in doing so, the Court should exercise great caution because, unlike the trial Judge, the Appeal Court did not have the benefit of seeing and hearing the witnesses testify – **Kimeu v Republic [2002] IKLR 756 at 759**.

The evidence adduced by PW 1 in the superior court cannot be equated to that of an eye witness. She said she was behind the elder son's house, wherever this was. She did not explain the direction this place

was from where the deceased was except giving its distance as from "*the witness box to outside*". She said she saw and heard the deceased saying "*Rama unaniuwa*" (Rama you are killing me). Then she saw the appellant standing behind the deceased holding a panga. She ran to call the deceased's children who were making or constructing a well. They included PW 2 and PW 3. When she came back to the scene with PW 2 and PW 3, the deceased had fallen to the ground. PW 2 said he saw the appellant standing there holding a blood stained panga.

In the meantime, the appellant went to Bamburi Police Station where he was seen by PW 5 (wrongly listed as PW 4) and PW 6 (wrongly listed as PW 5). Though the first police officer who saw the appellant at the police station and took him to his station commander, PW 5, was not summoned to testify, the two police officers who testified saw the appellant with a blood stained panga which was produced in court as exhibit 1. Though therefore there was no direct evidence to implicate the appellant with the commission of the offence subject to this appeal, there was this circumstantial evidence which the superior court thought pointed to the appellant and no other as the person behind the murder of the deceased.

To act on circumstantial evidence to support the conviction of an accused person, the evidence must point irresistibly at the accused's guilt to the exclusion of everybody else – see **Tumuheire v. Uganda [1967] E.A. 328** and **R. V. Kipkering Arap Koskei & Another [1949] 16 EACA 135**. But there is a second principle which is clearly enunciated in the case of **Simoni Musoke v. R. [1958] EA 715** and re-echoed in the case of **Privin Singh Dualay v. R. – Criminal Appeal No. 10 of 1997** (unreported) amongst others, that before drawing the inference of the accused's guilt from circumstantial evidence, the court must be sure that there are no other co-existing circumstances which would weaken or destroy the inference.

In all criminal cases, the onus is on the prosecution to prove the case against the accused beyond any reasonable doubt and this burden never shifts to the accused. However, the evidential burden may at some stage of the trial shift to an accused person, for example, under **section 111(2)** of the Evidence Act.

The superior court disbelieved the *alibi* defence of the appellant on the basis that the person whom PW 1 saw holding a panga and standing behind the deceased was the appellant, and that when she went to call the deceased's children, PW 2 and PW 3, and came back to the scene with them, they found the appellant still there with the deceased having fallen to the ground, dead.

In the meantime, the appellant surrendered to Bamburi Police Station where PW 5 and PW 6 saw him with a blood stained panga. Though the deceased called out that "*Rama unaniuwa*" (Rama you are killing me), PW 1 did not see Rama there though he is known as one of the sons of the deceased. Even the appellant himself did not blame Rama for the deceased's death.

In our view, the superior court based its decision on sound reasoning and we find ourselves in agreement with the learned Judge's decision and thus cannot interfere with his decision.

We are not persuaded that the learned Judge erred either in law or on facts as alleged in the grounds listed in the memorandum of appeal. Nor do we find merit in the argument that the appellant did not follow the proceedings in part due to language factor since, from the start through to the end, there was a Kiswahili interpreter present in court. Though the proceedings were somehow jumbled up with wrong numbering of witnesses and other minor omissions, we were, however, able to follow them reasonably well though we feel that in future, the records before the Court should be meticulously prepared.

In the result, we find that this appeal has no merit. We order that it be and it is hereby dismissed in its entirety.

Dated and delivered at Mombasa this 25th day of July, 2008.

R.S.C OMOLO

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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