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

Criminal Appeal 443 of 2007

NYANDO MUKUTA MWAMBANGA ……..……. APPELLANT

AND

REPUBLIC ……..RESPONDENT

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

at Mombasa (Mr. Justice Mwera) dated 4th January, 2007

in

H.C.CR.C. NO. 14 OF 2002)

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JUDGMENT OF THE COURT

The appellant was tried by the superior court with the aid of assessors on the information (charge) of murder contrary to ***section 203*** as read with ***section 204*** of the Penal Code. He was alleged to have murdered one ***MIZINGO MUNGA GUBE*** (deceased) on 2nd April, 2001. He was convicted and sentenced to death. This is his first and final appeal.

On 2nd April 2001, the child of Mwahanje Ndegwa Mwakilunge (PW1) (Mwahanje) fell sick and he took him to hospital. The child however, died on the way to hospital and funeral was arranged to take place in the afternoon. The funeral was attended by villagers among them, Ndimiro Ndegwa Mwachilungo (PW3) – a brother of Mwahanje; Munga Ndegwa (PW6), another brother of Mwahanje; Ngana William Mlelu (PW4); Beja Munga, (PW5) a brother of the deceased; Mizingo Munga Gube (deceased) and Nyando, the appellant. The deceased and the appellant are related to Mwahanje by marriage as Mwahanje has married the appellant's sister while the deceased had married Mwahanje's aunt.

It was the prosecution's case that after the burial the appellant started chasing people with a panga saying that he would kill somebody and as the people were dispersing the appellant cut the deceased several times on the head, neck and shoulder. He fled towards his home after the incident. The deceased

fell down and died shortly thereafter.

At about 8.45 p.m., Beja Munga (PW5) and two other people reported the assault to Chiputu Kube (PW7) the village chairman who after viewing the body reported the matter to Samburu police post. On the following day at 3 p.m. P.C. Reuben Mutua (PW8) visited the scene in the company of a Doctor who performed a post mortem there. According to the post mortem the deceased who was about 65 years of age had multiple deep cut wounds on the head, left neck and shoulder. The Doctor formed the opinion that the cause of death was severe haemorrhage with head injury secondary to trauma. The appellant was arrested on information about two weeks later.

The appellant gave sworn testimony at the trial. He testified, among other things, that, he attended the funeral at the home of Mwahanje; that he left after the funeral; that he learnt of the death of the deceased on the following day; that after he was arrested on or about 16th April 2001 he was taken to Samburu police station where he found Beja Munga (PW5) and Ndimiro Ndegwa (PW3) in custody; that the two bribed the police and were released; that he also paid Shs. 10,000/= bribe to police but the money was later returned to him. He denied killing the deceased.

The trial proceeded with the aid of three assessors but one failed to attend the last hearing and the superior court directed that the trial do proceed with the two assessors present. After the trial the two assessors gave a unanimous opinion that the appellant was guilty of murder. The superior court ultimately convicted the appellant and sentenced him to death.

The appellant appeals against the conviction and sentence on five grounds. We should state at the outset that ground No. 3 of the appeal - that the trial Judge failed to consider that there was bad blood between the appellant and prosecution witnesses and ground No. 4 that the post mortem was neither properly performed nor the post mortem report properly produced as exhibit were not pursued in this appeal. Indeed there was no evidence in the superior court that there was any bad blood between any of the prosecution witnesses and the appellant. Indeed the appellant did not in his testimony state that as a matter of fact that there was bad blood between him and any of the prosecution witnesses.

There was no doubt about the cause of death of the deceased. He died at the scene shortly after he was viciously cut with a panga on the head, neck and shoulder. The post mortem was done at the scene by a Doctor who signed the post mortem form and handed it over to PC Reuben Mutua (PW8) who later produced it as an exhibit.

The rest of the grounds of appeal raise the issues of the sufficiency of the evidence; the credibility of the prosecution case and the failure to consider the defence of alibi put forward by the appellant.

This Court as the first appellate court has a duty to re-appraise the evidence and come to its independent finding. In doing so we have to appreciate that we do not have the advantage enjoyed by the trial court of seeing and hearing the witnesses and have to make due allowance for that - ***Soki v Republic*** [2004] 2 KLR 21; ***Kimeu v Republic*** [2002] 1 KLR 756. Moreover, we are guided by the principle that the first appellate court should not interfere with the findings of the trial court which were based on the credibility of witnesses unless no reasonable tribunal could make such findings, or it was shown that the findings of the trial court are erroneous in law (***Republic v Oyier*** [1985] 2 KLR 353; ***Burn v Republic*** [2005] 2 KLR 533).

The first ground of appeal is to the effect that the trial Judge erred in law in failing to consider that the circumstances prevailing at the scene were not conducive to positive identification. Mr. Okoth Odera for the appellant submitted that the superior court failed to evaluate the entire evidence and that had the court evaluated the evidence it would have found the evidence was both contradictory and inconsistent regarding both the time of the commission of the offence and how the incident occurred.

The issue of the contradictions in the evidence of the witnesses as to the time the offence was committed was raised by Miss Adhiang' who appeared for the appellant at the trial. Her submission on that aspect was recorded thus:-

"***Miss Adhiang' submitted that the prosecution had not proved their case beyond reasonable doubt mainly because its witnesses had spoken of various times when the offence allegedly took place; 5 p.m., 7 p.m., 7.30 p.m., 8 p.m. etc."***

The superior court evaluated the evidence regarding contradictions as to time and concluded;

"***The incident took place between late evening and night. The illiterate, non watch-wearing witnesses cannot be blamed for the variation in times. But their evidence was credible and innocent as any rustic dwellers of our rural areas can be. The murder took place in the evening/night on 2nd April, 2001 in the compound of PW1."***

The superior court further considered the evidence of identification of the appellant by PW1, PW3, PW4 and PW5 as the person who cut the deceased with a panga, the credibility of those witnesses and the appellant's defence of alibi and concluded:-

"*The accused planned this act otherwise why would he announce to his brother-in-law the bereaved (PW1) that he was about to kill somebody? And sure enough he did.*

The court did not believe that on that day the accused had gone to pay dowry with his uncle Juma only to learn of the death of PW1's child, and then return to bury it. That then he returned to the place he had visited until mid-night when he went home to sleep, drunk.

*Those attempts at an **Alibi** were displaced by the direct evidence of the witnesses especially PW1, PW3, PW4 and PW5. They knew the accused as a relative or as a neighbour. They buried the dead child with him. Even he himself said so. They had no grudges or problems with him. He seemed to confirm that. To this court's mind they did not lie about what they saw. It was late evening or night, yes. But this is someone they knew very well. They had been sitting close to them when he sprung up to assault the deceased after the burial of the dead child. This court believed them. They did not mistake the accused or tell a lie against him".*

Thus the superior court believed the material witnesses (that is PW1, PW3, PW4 and PW5) that each of them saw the appellant cut the deceased and made a finding that the witnesses did not mistake the appellant or tell a lie against him and that the defence of alibi was displaced by the direct evidence of the witnesses.

It is clear that none of the four material witnesses had a wrist watch and the time given by each was based on opinion.

Although Mwahanje estimated the time when the deceased was attacked as at about 8 p.m., he said that:-

"***It was dark but not so dark".***

Ndimiro Ndegwa estimated the time of the incident as 7.30 p.m. and said:-

"***It was beginning to be dark"***

and later that;

"***The incident took place at about 7 p.m. because darkness was just gathering".***

Beja Munga on his part said;

"***It was during daylight at about 7 p.m. It was getting dark".***

That evidence shows that darkness had not fully set in when the deceased was assaulted. The

witnesses knew the appellant before. The appellant and the witnesses had just buried the child of Mwahanje. The deceased was attacked within the home of Mwahanje as people were dispersing and at a relatively short distance, from where the witnesses were. Two of the witnesses Mwahanje and Beja Munga are brothers-in-law of the appellant.

The appellant testified that upon arrest he found Beja Munga and Ndimiro Ndegwa in custody as suspects and that the two bought their freedom. Appellant also claimed that he paid money for his freedom but the money was returned. It was submitted on behalf of the appellant that the evidence of Ndimiro Ndegwa and Beja Munga was self exculpatory.

There is evidence that Ndimiro Ndegwa is a brother of the deceased and that Beja Munga is a brother-in-law of the appellant. There is no evidence whatsoever that both Ndimiro Ndegwa and Beja Munga assaulted the deceased and the appellant did not say so. Indeed PC Reuben Mutua did not explain why the two were in police custody.

The evidence of Chipulu Kube the village chairman shows that Beja Munga is one of the three people who reported to him at 8.45 p.m. on the same day the deceased was assaulted that the deceased had been assaulted with a panga by the appellant. There are no reasons why any of the four material witnesses could have fabricated the evidence against the appellant.

Lastly, it was submitted by the appellant's counsel that by the repeated use of word "*murder"* in the proceedings and by agreeing with the opinion of the assessors before evaluating the evidence, the superior court, shifted the burden of proof. This is not however, one of the grounds, of appeal.

The word "*murder"* denotes causing the death of another person with malice aforethought and on a charge of murder both the act causing death and the guilty mind has to be proved. We agree that it is a misdirection to use the word "*murder"* in the proceedings before the Court has in fact made a finding on the evidence that murder has been committed - See ***Kioko v Republic*** [1982-88) 1 KAR 157.

However, this misdirection did not occasion any prejudice as the superior court ultimately evaluated the evidence and made a finding that murder had in fact been proved.

Similarly, it is preemptory and indeed a misdirection for the trial court to signify its agreement with the opinion of assessors before making an independent evaluation of the evidence and coming to its own independent findings. (See ***Geoffrey Nguku v Republic*** [1982-88] 1 KAR 818). In this case although, the superior court said that it had agreed with the opinion of assessors before evaluating the evidence, it nevertheless exhaustively evaluated the evidence and made its independent finding that the appellant was guilty of murder. The misdirection has not thus caused a failure of justice.

On our own evaluation of the entire evidence, we like the superior court, have come to the conclusion that the charge against the appellant was proved by overwhelming and credible evidence. Accordingly this appeal is dismissed.

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