



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT MOMBASA

Criminal Appeal 376 of 2006

- 1. ALEX MISEKI WAMBUA)
- 2. FRANCIS KIOKO JAMES)
- 3. JACKSON MBWAKA NDAMBUKI)
- 4. JAMES MUSAU KIANYAUWI).....APPELLANTS

AND

REPUBLIC.....RESPONDENT

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

(Khaminwa, J) dated 14th November, 2006

in

H.C.Cr.C No. 50 of 2004)

JUDGMENT OF THE COURT

These four appellants, *Alex Miseki Wambua* (1st appellant), *Francis Kioko James* (2nd appellant), *Jackson Mbwika Ndambuki* (3rd appellant) and *James Musau Kianyauwi* (4th appellant), were on 19th November, 2004, presented before the High Court, at Mombasa, with an information charging them jointly with the offence of murder contrary to **section 203** as read with **section 204** respectively of the Penal Code, particulars of which read as follows:

“1. Alex Miseki Wambua 2. Francis Kioko James 3. Jackson Mbwika Ndambuki 4. James Musau Kinyauwi: On the 18th day of October 2004 at Kidondoni village Challa Location in Taita Taveta District within Coast Province, jointly murdered Putani Ole Kiunga alias Masai.”

Upon their plea of not guilty to the charge the appellants were tried with the aid of assessors and were thereafter convicted and sentenced to the mandatory death penalty. Their conviction was based wholly on circumstantial evidence. This is their first and last appeal in which respectively they have raised three main grounds as follows:

- (1) **Their conviction was based on insufficient and contradictory evidence.**
- (2) **Certain essential witnesses were not called to testify.**
- (3) **The assessors gave their opinion contrary to the provisions of section 263 of the Criminal Procedure Code.**

During the hearing of the appeal, however, the appellants' counsel submitted before us that in his view there were two issues, firstly whether indeed the trial court properly held that the deceased had made a dying declaration which clearly and unmistakably identified each of the appellants as having inflicted bodily injuries which eventually caused his death, and secondly, whether the circumstantial evidence presented to the court pointed to the appellants to the exclusion of all other people as having inflicted the fatal injuries on the deceased. But before we deal with submissions on these issues it is important to set out the background facts, in resume form only, relating to the charge.

On or about 18th October 2004, a bullock belonging to Domitila Wambua Nzuvu (PW3) and her son Daniel Mutiso Wambua (PW4) was stolen. Putani Ole Kiunga alias Masai, was suspected to be the thief. A crowd gathered when PW3 raised an alarm. The crowd confronted the deceased who allegedly offered to lead the people to the person to whom he had sold the bullock. Witnesses are not clear as to when some injuries later found on him were inflicted, but what is certain is that at some point in time he was abandoned by the road side and the people crossed the Kenya – Tanzania border and there they found the bullock in a certain home on the Tanzania side of the border. A careful reading of the evidence reveals that the people who were pursuing the stolen bullock were in two main groups. The first group is the one which abandoned the deceased along the road to Tanzania. Among witnesses who testified on this aspect were Joseph Masawe alias Heremeni Gridi (PW1), Daniel Mutiso Wambua (PW 4), and John Mutiwe Klawu (PW5). These were in the first group, but none of them said they witnessed any assault on the deceased.

The second group came later. This later group included Rose Ermenekilt (PW2) and PW3. In their evidence these witnesses testified that when they saw the deceased on that day, he had multiple serious injuries all over his body. PW2 testified that she saw the four appellants with the deceased. The four requested for soda from her. She owned a kiosk in which she sold soda. It is not clear from her evidence whether she actually gave them the soda. It would, however, appear that they left before she gave them the soda, because her next statement was that she saw the deceased looking quite ill, but all the four appellants had disappeared. She did not witness any assault on the deceased.

PW3 on the other hand testified that she saw the appellant Miseti, push the deceased and that he collected grass, put it on the deceased's body and asked his companions for matches presumably to set him on fire, but he was prevailed upon to stop it. Like PW2 she stated that she did not see anybody beating the deceased.

The post mortem report shows that the deceased's legs were covered with mud and his scalp was depressed on the left parietal region and had lacerations; oedema of brain tissue on the left lobe and subdural hemorrhage on the left and occipital lobes of the brain. These were the immediate cause of the deceased's death.

In their defence each of the appellants denied the offence. The first appellant stated in a statutory statement that he arrived at the scene after the deceased had been assaulted, went to the house of PW1 where he took some liquor as a result of which he became drunk to the extent that he could not accede to a request by PW3 to take the deceased to hospital.

The third appellant in an unsworn statement stated that he arrived at the scene while the deceased was being beaten and with other persons he engaged in a beer drinking episode after which he left and went to his house. He stated that he saw the deceased being beaten but he fell short of giving the name or names of his assailants.

The second appellant's defence was an alibi. He stated that he is a carpenter by profession and that he went to Taveta town in the morning of the material date where he works and remained there until evening when he returned to his home. Thereafter he went to Masawe's house where he joined other people in drinking beer, after which he went to sleep. He denied witnessing the beating of the deceased or himself participating in the beating.

The 4th appellant like the 2nd appellant gave an alibi defence. He stated that he went to work on his farm at about 11.00 a.m. and never returned home until 7.00 p.m. He thereafter went to Masawe's house where he bought some beer, drunk it for quite a while before he returned to his home. He also denied he witnessed the beating of the deceased or having beaten the deceased.

In her judgment Lady Justice Khaminwa believed witnesses who testified that the four appellants were the last people seen with the deceased before he died. On the basis of that and an alleged dying declaration that the appellants are the ones who beat him up she found the appellants guilty as charged. She expressed the view that the evidence presented by the prosecution showed circumstances which “**implicate the accused persons.**”

This is a first appeal and we remind ourselves that in such an appeal it is our duty to re-evaluate the evidence and come to our own conclusions on the relevant aspects without overlooking the conclusions reached by the trial court and also bearing in mind that unlike the trial judge we are disadvantaged having not heard and seen witnesses testifying as to assess their credibility as witnesses. (*OKENO V. R.* 1972 EA 32).

We start by expressing our dismay in the manner the evidence was recorded. The trial judge recorded the evidence in a mixture of English and we believe Swahili, and without coherence in many respects. For instance, PW3 is recorded as having said “**I know John is my Shemeji in law.**” PW4 said “**We decided to go to Mzee wa Mtaa**”. “**I tried with Bibi ya Masawe.**” And PW5 said “**They went to see Mtungi they did not find it.**” PW6 said “**As we went he wanted to jisaidia.**”; “**Rose was manning a duka and she sold pombe.**” It is undesirable to record evidence like this, but if for emphasis and clarity purposes one considers it appropriate to record verbatim in a language other than English aspects of the evidence, then it is important that a translation thereof is included. Trial courts do not record evidence for their use only but also for use by the appellate court or courts in the event of an appeal. The appellate court has to understand the evidence fully in order to appreciate the issues raised in the appeal before it. Otherwise there is the likely danger of that court not understanding the evidence with the risk of the appeal either being improperly dismissed or allowed.

In his submissions before us I. Onyango, counsel for all the appellants, urged the view that the evidence relating to the dying declaration was contradictory and on the basis of the decision in *R V. Abdi Abaloni Kilifi* [2005] eKLR (Cri. C. No. 8 of 2005) he submitted that where such is the case the Court must act on the dying declaration with caution. Besides he said no one saw the deceased being beaten. Consequently, he said the circumstances do not point to the appellants or any of them as having committed the act complained of.

Mr. Ondari, the Assistant Deputy Public Prosecutor, in supporting the appellant’s conviction, submitted that the deceased’s dying declaration and all the surrounding co-existing circumstances should be considered together. In his view the deceased named his assailants in his dying declaration and that evidence was led to show that the appellants were the last people seen with deceased alive. Consequently, in his view, a presumption of fact under *section 119* of the Evidence Act could be raised that in absence of any explanation, they are the people who beat the deceased and inflicted fatal blows on him.

There are certain salient aspects to this case which fundamentally go to the root of this appeal. A crowd gathered and headed towards the Kenya/Tanzania border in pursuit of a stolen animal. Various witnesses gave suggestions as to the number of people involved. PW1 estimated the number at 70. PW4, PW6 and other witnesses estimated the number to have been more than 11 people. 3rd appellant estimated the number at over 100 people. With such a large number of people there is the possibility that some of them not being these appellants inflicted the fatal blows on the deceased. The most serious injury was on the left side of his head suggesting that one or two people inflicted the injuries. Otherwise the post mortem report would have shown other injuries elsewhere.

R. V. Kipkering Arap Koske and *Simoni Musoke V. R.* lay down the principles to guide the courts when the evidence relied upon by the prosecution is, as here, wholly circumstantial in nature.

In *Rex V. Kipkering Arap Koske & Another* (1949) XVI EACA 135, the Court of Appeal for Eastern Africa held quoting from Wills on Circumstantial Evidence that:

“In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused.”

The same Court expanded the principle in *Simoni Musoke V. R.* [1958] EA 715, which cited with approval the following passage from the Privy Council decision in *Teper V. R.* [1952] AC 480 at P. 489,:

“It is also necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference”.

The evidence herein does not in our considered view exclude co-existing circumstances which weaken the inference that the appellants, to the exclusion of all other persons, inflicted the fatal blows on the deceased. It is probable that the appellants were responsible. But this is a criminal case which must be proved beyond any reasonable doubt. It cannot be said that the prosecution in our case met that standard of proof. This is not a case in which the appellants could be called upon to explain anything or where a presumption of existing facts could be raised under *section 119* of the Evidence Act.

Having come to the foregoing conclusions we think that the trial court improperly entered a conviction against all the appellants. The manner in which the witnesses presented their evidence is suggestive of the fact that there was something they were withholding from the court. In the circumstances we are compelled to interfere. Accordingly we allow the appellants’ respective appeals, quash their respective conviction and set aside the sentence of death imposed on

each one of them. They must therefore be set at liberty forthwith unless otherwise lawfully held. We so order.

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

R. S. C. OMOLO

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JUDGE OF APPEAL

S. E. O. BOSIRE

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR