REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT MOMBASA

Criminal Appeal 273 of 2006

1. SHIDA KAZUNGU BAYA)

2. ELIZABETH KADZO KARISA)

3. MARY KAINGU KITHONGO) …… APPELLANTS

4. SIKUBALI BAYA MWARO)

5. KITSAO PETER KATANA)

AND

REPUBLIC …… RESPONDENT

(Appeal from convictions and sentence of the High Court of Kenya at Malindi (Ouko, J) dated 16th October, 2005

in

H.C. Cr. Case No. 16 of 2004)

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JUDGMENT OF THE COURT

In an information dated 16th September 2004 and filed in the superior court on 4th October 2004, all the five appellants namely **Shida Kazungu Baya, Elizabeth Kadzo Karisa, Mary Kaingu Kithongo, Sikubali Baya Mwaro and Kitsao Peter Katana**, the first, second, third, fourth and fifth appellants respectively who were then the fourth, the second, the third, the first and the fifth accused respectively, were charged with the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code. The particulars were that:

"**On the 15th day of May, 2004, between 6.00 p.m. and 8.30 p.m. at Saba Saba area at Hindi in Lamu District within the Coast Province, jointly murdered Masha Kalama."**

They pleaded not guilty to the charge but after a full trial with the aid of assessors, in a judgment delivered on 4th October 2005, the superior court (Ouko J.) found each of them guilty of the offence as charged, convicted them and sentenced each to suffer death in accordance with the law. In convicting the appellants, the learned Judge stated in his concluding remarks

as follows:

"**All the five accused persons were placed at the scene of the crime by overwhelming prosecution evidence. I agree with the unanimous opinion of the assessors that the accused persons are guilty. I find the five accused persons guilty of the offence of murder, convict them accordingly. They are sentenced to suffer death in accordance with the law."**

All the assessors were of the unanimous opinion that the appellants were guilty.

The appellants felt dissatisfied with that conviction and sentence and hence these appeals each of which is premised on the memorandum of appeal filed by each appellant in person and which grounds of appeal were adopted by Mr. Kadima, the learned counsel for the first, fourth and fifth appellants and Mr. Chidzipha, the learned counsel for the 2nd and 3rd appellants.

At their trial in the superior court, the prosecution called seven witnesses. As this is a first and last appeal, and as full appreciation of the case that was before the superior court demands, we set out the brief facts of the case that was before the superior court as is apparent in the record of appeal before us.

The deceased, Masha Kalama, was the father to Rahelly Dama Masha (PW 1) Loise Zawadi Masha (PW 2) and Rehema Tabu Masha (PW 3). Zawadi and Rehema were living with the second appellant. Loise Zawadi Masha (Zawadi) was below 10 years whereas Rehema Tabu Masha (Rehema) was 13 years old. The deceased was also a neighbour to Furaha Katana Kahindi (PW 4) (Furaha). These three witnesses were the main eye witnesses. They gave different versions of what happened. We shall endeavour to set out in brief what each of them said in evidence at the appellants' trial. Zawadi's evidence was that she recalled the events of that fateful day. Houses were bunt, and she heard the second appellant saying that if she had money she would have killed the deceased. On Saturday the deceased came from Mpeketoni and the second appellant told him to go to the place where the second appellant was selling traditional liquor and that the second appellant would follow the deceased to that place. The second appellant also sent a brother of the fifth appellant to go and tell the fifth appellant that the person they wanted had come and the second appellant also sent Stephen, her brother, to go and call the first and fourth appellants. Those two responded and went to the place where the brew was being sold commonly known as "*Mangweni*". They found the deceased playing with the third appellant. The first and the fourth appellants according to this witness, told the deceased to sit down and at that time, Furaha (PW 4) started beating the deceased as he was telling him that he (the deceased) was "practising witchcraft". Others joined Furaha in beating the deceased but at that time, Furaha asked the first, fourth and fifth appellants not to beat the deceased but the three told Furaha not to protect a wizard. They continued beating the deceased and as they did so, the second appellant asked one Stephen, her brother, to go and bring pepper while the fifth appellant poured soil in the deceased's eyes. They also put pepper in the deceased's eyes. The third appellant hit the deceased on the head with a mortar for pounding grain as the second appellant screamed "*ua Kabisa*". They then pulled the deceased and left him under a tree and the first and the fifth appellants left. The second appellant told all who had assembled nearby to go away. Zawadi and Rehema left the scene. At that time, the deceased was groaning and was lying under a tree at the second appellant's house. He could not move. In cross examination, Zawadi stated that although there were other people drinking at the scene, none of them apart from the five took part in beating the deceased. They were only drinking and cheering up the five and she confirmed that Furaha beat the deceased with the fists.

Rehema had been sent that afternoon to collect maize which the deceased had brought and had left at Hindi. She returned home at about 5.00 p.m. According to her version, she stated, *inter alia*, as follows in her evidence in chief:

"**When I got home I found the deceased being beaten by all the accused persons in court. I informed PW 1 that the deceased was being beaten….. After this incident, 2nd accused told us to leave her house. We did and returned to take our things. I found 2nd, 3rd and 4th accused. I did not see the deceased."**

In cross examination, Rehema explained that the deceased arrived home at 12 noon and then went to "*Mangweni*" where local brew was sold and which was a bushy area about 40 metres from home. She saw the five appellants but the third appellant was not doing anything, neither was she carrying anything. She was merely standing nearby. She substantially changed her story and said:

"**I did not see those who were beating the deceased. ……. I saw all the 5 accused persons coming from Magweni given (sic). They had with them the deceased who was lying down. 3rd and 4th accused were dragging the deceased on the ground."**

The events as related by Furaha are that on 15th May 2004, he went to the second appellant's house and ordered for a cup of *muratina*. The only man he met drank his *muratina* and left. Furaha remained alone at the drinking den. The deceased joined him for a drink. Briefly thereafter, the first, fourth and fifth appellants arrived at the scene. The second appellant ordered the deceased to sit down as the fourth appellant told the deceased that they were looking for him (the deceased). The three then set on the deceased and beat him. Furaha tried to intervene but was also injured in the course of his intervention. According to Furaha, the deceased's pair of trousers was removed and Kshs.520/= in the pockets removed. All the three beat the deceased but the second and the third appellants did not beat the deceased. Furaha went to his house and returned after $1^1/_2$ hours but found the three i.e. the first, fourth and fifth appellants still beating the deceased. He noticed the deceased was bleeding from the mouth and nose as well as from the head and face. He (Furaha) went away. Furaha's version is that Zawadi was at the scene for about one minute only and ran away on seeing the deceased being beaten. He denied beating the deceased.

As we said earlier in this judgment, the above three eye witnesses had different versions of what transpired at the scene and that is the reason for our going into each of their versions. Whatever is the correct version, Rahelly Dama Masha (PW 1) (Dama), was on that day at 5.30 p.m., coming from the shamba walking home. She heard her father's voice. When she neared the place where the noise was coming from, she met Rehema who told her that the deceased was being beaten by the appellants. She got a bicycle and went to the Administration Police Camp at Hindi to report the incident. She reported to the Administration Police Officer. The officer, according to Dama, went to the scene but told her that the deceased had ran away to Mpeketoni and the appellants were not there. Dama did not go to look for the deceased but later she noted while at the second appellant's home that the deceased's clothes were missing. The second appellant produced a paper bag in which the clothes were. When the clothes were removed from the paper bag, Dama noted that there were blood stains on the pair of trousers. The Administration Police Officers at Hindi reported the incident to Cpl. Samir Athman Yunus (PW 6) of Mokowe Police Base under Lamu Police Station on 17th May 2004. With the help of the Administration Police Officers at Hindi, investigations were carried out by police and the body of the deceased was exhumed from a shallow grave at a place called Kihiboni, to where the police were led by the first and fourth appellants. The body had begun to decompose. The appellants were arrested. On 22nd May 2004, Dr. Kombo Mohamed Bwana (PW 7) conducted postmortem on the body of the deceased at Mikowe Health Centre. He concluded that death was caused by chest injuries.

In their defences, the first and fourth appellants denied having been at the scene of the incident on the material day whereas the second, third and fifth appellants, while admitting being at the scene, denied being involved in any fight at the scene with the second appellant admitting that at 6.00 p.m., while at her *shamba*, she heard noise from her club and went to find

out what it was all about. She found people grouped in three camps. She asked them to stop causing trouble at her place. They obeyed and went their different ways. She took her utensils and left for her home.

The above is the evidence that was before the superior court, and upon which the appellants were convicted. Mr. Kadima, the learned counsel for the first, fourth and fifth appellants, submitted at length that it was not proper for the learned Judge to base his conviction on the evidence of Zawadi and Furaha when the evidence of the two was contradictory of each other on the material aspect and could not corroborate each other as each of the two witnesses' evidence required corroboration. Evidence that itself requires corroboration cannot be used as corroboration of another evidence. This was particularly not proper, he argued, when during examination of Zawadi, it became clear that she was a child of tender years who did not understand what sin was. He further pointed out contradictions in the evidence adduced by Zawadi and Furaha and urged us to treat with caution the evidence of Zawadi, Rehema and Furaha. Mr. Chidzipha adopted the submissions of Mr. Kadima and added that the prosecution did not prove motive for the second appellant to commit the offence.

Mr. Ondari, the learned Assistant Deputy Director of Prosecutions, conceded the appeal arguing, first, that the evidence of Zawadi, Rehema and Furaha was largely contradictory and pointed out four aspects of the contradictory evidence, and, secondly, that the learned Judge of the superior court misdirected himself when he found that the evidence of Zawadi was corroborated by the evidence of Furaha yet Furaha himself was a suspect and his evidence also required corroboration and, lastly, that the evidence that the appellants or some of them led the police to the place where the deceased's body was recovered was inadmissible and so could not be relied on for conviction.

The learned Judge of the superior court, in our mind, rightly directed himself as to the issue that was before him for determination when he stated in his judgment:

"**The issue for determination is whether the five accused persons inflicted these injuries on the deceased; whether they did so with common intention and whether they had malice aforethought."**

In resolving those issues, he relied heavily on the evidence of Zawadi. He stated in the judgment:

"**The accused persons were people well known to the witnesses and apart from them, there only (sic) three other people at Magweni. In other words, the scene of the attack was not crowded. Those who attacked the deceased were only the accused persons. Zawadi, although a child of tender years, gave credible and truthful evidence. She recounted the incident with such clarity and detail that I have no doubt that she witnessed the attack. She gave evidence under oath and was steadfast on cross-examination. She gave an account of who did what to the deceased.**

First, she heard the 2nd accused directing the deceased to go to Mangweni before she sent for the 3rd, 4th and 5th accused persons. As the three were beating the deceased, the 2nd accused was cheering and urging them to "*ua kabisa*" (to kill). ……..

Zawadi also told the court that the first accused hit the deceased on the mouth with a mortar for pounding grains, while the 3rd accused beat the deceased with his fists and also put soil in his eyes.

The 4th accused kicked and walked on the deceased with shoes. He also put pepper in the deceased person's eyes.

On his part, the 5th accused was hitting the deceased with fists."

Perhaps what the learned Judge forgot to include was that Zawadi also stated in evidence:

"**The 4th and 5th accused told the deceased to sit down. Furaha started beating the deceased. He (Furaha) was outside. He was telling the deceased that he was practicing witchcraft as he beat him the others ……. (sic)."**

From what will be said later in this judgment, that piece of evidence was important. Be that as it may, the learned Judge in further analysis of the evidence that was before him so as to resolve the issue as to whether the appellants inflicted the injuries that resulted into the death of the deceased relied on the evidence of Furaha first to establish veracity of the evidence of Zawadi and to find corroboration of Zawadi's evidence. He stated:

"**Furaha, who was actually at the scene and even tried to stop the accused persons from beating the deceased. Gave (sic) a similar account as that of Zawadi."**

On the question of the need for corroboration of Zawadi's evidence, the learned Judge was alive to it but he found that corroboration in the evidence of Furaha and went on to state that even if it was to be argued that Furaha was an accomplice, his evidence was admissible without corroboration under **section 141** of the Evidence Act, but accepted that as a matter of practice, an accomplice's evidence would require corroboration and in this case, he found that corroboration in the corroborated evidence of Zawadi and that of the doctor as he found there was evidence linking the five appellants with the injuries from which the deceased died. Thus, the learned Judge found that the evidence of Zawadi was corroborated by the evidence of the doctor and of Furaha whereas the evidence of Furaha was corroborated by the evidence of Zawadi which was already corroborated by that of the doctor. This is where we find difficulty in appreciating the learned Judge's decision.

The law is now well settled that the evidence of a child of tender years requires corroboration except in sexual offences cases. The learned Judge appreciated that. It is also a legal principle that the evidence of an accomplice requires corroboration. Again, the learned Judge appreciated that. We however do not appreciate that evidence that requires corroboration can be corroborated by another evidence which in itself also requires corroboration. In this case, Zawadi was a child of tender years who in fact, though said during examination by the court to ascertain whether she understood the effect of taking oath, that though she knew it was a sin to lie on oath but did not know what a sin is, gave evidence on the issue as to whether the five appellants were the people who inflicted the injuries on the deceased that resulted in his death. That is the evidence that required to be corroborated in material aspects. Furaha was mentioned by Zawadi as one of the people who assaulted the deceased and said the deceased was practising witchcraft. According to Zawadi, Furaha was the first person to assault the deceased. If that evidence is accepted, then Furaha should have been together with the five appellants in the dock. That in effect made Furaha an accomplice. Being an accomplice, Furaha's eviedence itself required corroboration. In law, that evidence could not corroborate that of Zawadi which also required corroboration as the offence was not a sexual offence excluded by the amendment vide **Act No 5 of 2003**. The learned Judge, however, held in his judgment that the evidence of Zawadi was corroborated by the evidence of doctor Kombo Muhamed Bwana. With respect, the evidence of doctor Mohamed could not have corroborated Zawadi's evidence on the material issue of whether the five appellants are the people who inflicted injuries on the deceased leading to his death. The doctor's evidence was that the deceased had fracture of the 6th and 7th ribs on the right side; that the diaphragm was torn and intestines moved to the chest cavity; that there were minor injuries on the brain region which had blood and that death was caused by chest injuries. That evidence does not and could not point to the identity of who inflicted the injuries enunciated in the post mortem report. In our considered view, Zawadi's evidence was not corroborated in material aspects either by the evidence of the doctor or that of Furaha. What about Furaha's evidence? The

learned Judge, apparently, did not accept he was an accomplice but without making any specific findings on that, the learned Judge went on to state:

"**Even if it was to be argued that Furaha was an accomplice, his evidence was admissible without corroboration. See section 141 of the Evidence Act. However; as a matter of practice, accomplice evidence would require corroboration. See Kinyua v. R. (2002) I KLR 256. I find that corroboration from the corroborated evidence of Zawadi and that of the doctor."**

We have stated above that the evidence of Zawadi was, in law, not corroborated either by the evidence of Furaha which also needed corroboration or by the evidence of the Doctor which did not corroborate it on the material aspect namely, whether the five appellants inflicted the injuries that resulted into the death of the deceased. That being so, it goes without saying that the evidence of Furaha could not be corroborated by the evidence of Zawadi and that of the doctor.

The effect of all the above is that the conviction proceeded on the uncorroborated evidence of a child of tender years and on the uncorroborated evidence of an accomplice. In the case of ***Obiri vs. Republic*** **(1991) KLR 381**, this Court stated at page 384 as follows:

"**One thing which is obvious and certain is that the evidence of PW 3, even if it was true, statutorily required corroboration. Section 124 of the Evidence Act provides:**

"***Notwithstanding the provisions of section 19 of Oaths and Statutory Declarations Act, where the evidence of a child of tender years is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support hereof implicating him."***

It is clear from his judgment that the learned trial Judge found PW 3 to be a truthful witness and accepted his evidence, but as we have said, the appellant could not have been convicted on that evidence "unless it was corroborated by other material evidence in support thereof implicating him.""

And as to the evidence of Furaha which was evidence of an accomplice, this Court considered at length a similar situation in the case of ***Kinyua vs. R*** **[2002] I KLR 257** and held, *inter alia*, as follows:

"**7. The firm rule of practice is that the evidence of an accomplice witness requires corroboration. It is however a rule of practice only and in appropriate circumstances, the court may convict without corroboration if it is satisfied that the accomplice witness is telling the truth upon the court duly warning itself and the assessors, where the trial is with the aid of assessors, on the dangers of doing so.**

8. Before corroboration can be considered, a court of law dealing with an accomplice witness must first make a finding as to the credibility of the witness. If the witness is so discredited as not to be worthy of any belief, that is the end of his evidence and unless there is some other evidence, the prosecution must fail. If the court decides that the witness though an accomplice witness, is credible then the court goes further to decide whether it is prepared to base a conviction on his evidence without corroboration. The court must direct and warn itself accordingly.

9. If the court decides that the accomplice witness' evidence, though credible, requires corroboration, the court must look for, find and identify the corroborative evidence."

The evidence of some of the appellants allegedly leading the police to where the body was recovered could have provided independent corroboration but it was, as per repeal of **section**

31 of the Evidence Act vide **Act No. 5 of 2003**, not admissible and therefore no evidence in law. That left the evidence of Zawadi, and that of Furaha, with no independent and credible corroboration.

The above is enough to dispose of this appeal. However, the learned Judge in his judgment made a finding that Furaha in his evidence "*gave a similar account as that of Zawadi*". Both Mr. Kadima and Mr. Ondari submitted in effect that that assertion was misplaced. We have, on our own, given hereinabove the different versions of the evidence of Zawadi, Rehema and Furaha. In our view, and with respect to the learned Judge, we observe that that finding could not have been based on facts in the record. For example, whereas Zawadi said that Furaha beat the deceased and was the first to do so and told the deceased that the deceased was practicing witchcraft, Furaha denied that allegation in his evidence; and whereas Furaha gave evidence that the appellants took Ksh.520/= from the deceased, Zawadi did not mention that. There are many aspects that could negate that finding by the learned Judge. Indeed, the contradictions are so many that it has not been easy for us to give a summary of the evidence adduced by all the three witnesses – Zawadi, Rehema and Furaha.

We think we have said enough to indicate that this appeal must succeed. We allow the appeal, quash the convictions and set aside the sentence of death imposed on each appellant. We order that all the five appellants be set at liberty forthwith unless otherwise legally held.

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

R.S.C OMOLO

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JUDGE OF APPEAL

E.O. O'KUBASU

…….

JUDGE OF APPEAL

J.W. ONYANGO OTIENO

……..

JUDGE OF APPEAL

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

DEPUTY REGISTRAR