



IN THE COURT OF APPEAL

AT NAIROBI

CRIMINAL APPEAL NO. 244 OF 2006

SAITOTI NDALAMIA

SIMON NDUKAI

JACKSON TARETO APPELLANTS

AND

REPUBLIC RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Nairobi (Osiero J) dated 28th November, 2003

in

H.C.CR.C. NO. 39 OF 2003)

JUDGMENT OF THE COURT

The three appellants were tried by the superior court with aid of assessors for a charge of murder contrary to *section 203* as read with *section 204* of the Penal Code. The particulars of the charge stated that on 14th day of April, 2001, the three appellants jointly with others murdered *WAMBUA WANGILA*. After the trial, the three assessors gave a unanimous opinion that each of the three appellants was guilty of murder. The superior court convicted each appellant as charged and sentenced each to death.

This appeal is against conviction and sentence.

Each of the three appellants was a night watchman employed to guard different premises at Huruma Estate, Nairobi. On 14th April, 2001 at about 5 a.m. some residents of the estate heard screams and they went out to answer the screams Annah Njoki (PW1), James Mutua Matata (PW3), Mary Machirima (PW4) and Fredrick Kasyoka (PW5) are among the people who went out to answer the screams. When Mary Machirima went out she found Saitoti (1st appellant) and another watchman with two boys. One boy escaped and the 1st appellant called another watchman to assist him. The 1st appellant also called one Simon Njuguna the owner of the premises who in turn called out the tenants and asked them if they knew the boy held by the watchman (deceased). All the tenants claimed that they did not know the deceased and started shouting that the deceased was a thief. When Annah Njoki and James Mutua Matata went to

the scene, they found the three appellants and another beating the deceased with clubs outside the gate of one of the premises. Annah Njoki and other residents pleaded with the three appellants to stop beating the deceased but the appellants threatened to beat them too. The deceased sustained several injuries on the head and legs and could not stand up. Later at about 8 a.m. Rose Ndinda, apparently the deceased's mother, who lives in the same estate hired a taxi and took the deceased to Kenyatta National Hospital. The deceased died on the same day and Dr. Kirasi Olumbe who performed the post mortem on 6th May, 2001 formed the opinion that the cause of death was head injury due to blunt object. On 16th April, 2001 I.P. William Ekasi (PW9) went to the scene in the company of the mother of the deceased and an informer led him to the house of Annah Njoki who in turn showed PW9 the appellants after which the appellants were arrested.

The first appellant stated in his defence at the trial, among other things, that he was employed as a night guard; that on 14th April, 2001 at 4 a.m. people knocked at his door and when he opened they entered into his house; that many people came to the scene after he raised an alarm and that he chased one of the people but he escaped. The 2nd appellant stated at the trial that on 14th April, 2001 at 4 a.m. while on duty as a night guard at Huruma, he heard screams from a neighbour and when he went there he found one man whom he did not know arrested and that they handed over the man to Simon Njuguna the caretaker of the premises. The 3rd appellant testified that on 14th April, 2001 at 5 a.m. while on duty as a watchman at Huruma he heard noise at the neighbouring plot and when he went there he found many people including the 2nd appellant who told him that a person had been arrested and taken by one Njuguna to the chief's camp. He denied beating the deceased.

The superior court after reviewing the evidence, stated, thus:

“What I have to decide is whether this evidence is reliable and free from possibility of error so as to find a secure basis for the conviction of the accused persons. Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize the danger”.

The superior court then evaluated the evidence and made the following findings:

“In the present case, the deceased was assaulted within a fenced plot and there were security lights. When the deceased screamed for help, the tenants of the plot came out and they saw the 3 accused persons beating the deceased using Masai clubs. They were able to see them through security lights. Accused 2 Saitoti (should be accused 1) was guarding the same plot where the deceased was being beaten while accused 2 and 3 were guarding the adjacent plots. These witnesses had known the accused before. PW1 Njoki said she witnessed the accused beat the deceased repeatedly and mercilessly as he screamed for help. She tried to persuade them to stop beating the deceased but they could not listen. PW3 James also tried to persuade the accused to stop beating the deceased but to no avail. The accused persons were positively identified as the conditions were favourable for a correct identification”.

The appellants raise three main issues in the supplementary memorandum of appeal, namely, the quality of the prosecution evidence; their identification and whether the evidence proved a charge of murder. Mr. Njuguna, learned counsel for the appellants submitted, among other things, that the conviction of the appellants was based on evidence that did not support the charge as drawn; that the evidence was contradictory; that the identification of the appellants was doubtful; that the superior court misdirected itself in finding that Mary Machirima (PW4) and Fredrick Kasyoka (PW5) identified the appellants and that the evidence adduced did not support the charge of murder.

It is our duty to re-evaluate the evidence, reconsider it and make our own independent findings.

The only contradiction referred to by Mr. Njuguna is that whereas the Information (charge) states that the offence was committed on 14th April, 2001 and the deceased died on the same day, that is contradicted by the evidence of Rose Ndinda (PW7) and Elizabeth Mbula (PW8) that the deceased was admitted in hospital for one day before he died.

The evidence was clear that the deceased was assaulted on the morning of 14th April, 2001 at about 5 a.m. The post-mortem report indicated that the deceased died on the same day, 14th April, 2001. The evidence of Rose Ndinda and Elizabeth Mbula is not at variance with the charge that the deceased was fatally assaulted on 14th April, 2001. In any case, variance between the evidence and the charge as to the time the offence was committed is immaterial (see *section 214* of the *Criminal procedure Code*). This ground of appeal with respect has no merit.

There was overwhelming evidence that the deceased was assaulted outside a gate at Huruma Estate on 14th April, 2001 at about 5 a.m. Annah Njoki, James Mutua, Mary Machirima, Fredrick Kasyoka, Rose Ndinda and Elizabeth Mbula, all testified to that. There was also overwhelming evidence that the deceased was screaming as he was being assaulted and that some of the residents of the estate went to the scene. The question is; who assaulted him? Annah Njoki testified, among other things, that she found the three appellants beating the deceased; that she stays in a plot next to where deceased was being beaten; that the deceased was being beaten outside the plot that Saitoti – 1st appellant used to guard; that she knew the deceased, that deceased used to roast maize for sale; that she knew the three appellants as guards who guarded nearby premises; that she knew 1st appellant by name and the 2nd and 3rd appellants by appearance; and that there was enough light from electricity. On his part, James Mutua Matata testified that, he identified the three appellants as the three people who were beating the deceased and that there was light from electricity. Mary Machirima testified that she found the 1st appellant whom she knew before with two boys and one escaped leaving behind the appellant and that the 1st appellant called other guards to assist him.

Annah Njoki was the key witness. Her evidence that she recognized the deceased and three appellants through electricity light was consistent. She was seen at the scene by James Mutua who supported her evidence that the deceased was assaulted by the three appellants and that there was light from electricity. There was also evidence from Rose Ndinda that Annah Njoki informed her that it was Saitoti who assaulted the deceased and also from I.P. William Ekasi that Annah Njoki pointed out to him the three appellants as the people who assaulted the deceased. The evidence of Rose Ndinda and I.P. William Ekasi lends credence to the evidence of Annah Njoki. All the three appellants admitted that they were night guards, that they were at the scene at the material time and that deceased had been arrested as a suspected thief.

The superior court evaluated the entire evidence and made a finding that the evidence that the appellants were recognized by Annah Njoki and also identified by James Mutua Matata as the persons who fatally assaulted the deceased was credible and believed it. It is true that the superior court misdirected itself by finding that Mary Machirima and Fredrick Kasyoka saw and recognized the appellants as the ones who attacked the deceased. The two witnesses did not specifically say that they saw the appellants assaulting the deceased. However, that misdirection does not weaken the evidence of Annah Njoki and James Mutua or the circumstantial evidence. This Court being mindful of the advantage enjoyed by the trial court which saw and heard the witnesses would not interfere with those findings of fact which were based on the credibility of all witnesses unless no reasonable tribunal would make such findings or it was shown that there existed errors of law (see *Republic vs. Oyier* [1985] KLR 353).

On our own analysis of the evidence, we are satisfied that there was overwhelming evidence that it is the appellants who caused the death of the deceased.

Mr. Njuguna submitted that the evidence did not support the charge of murder and, that, the incident occurred in the line of duty of the appellants as watchmen. Mr. Kaigai, learned Principal State Counsel concedes that the totality of the evidence supported a lesser charge of manslaughter. There is evidence that the deceased lived in the estate but when he was arrested, the residents claimed that they did not know him and that he was a thief. The deceased was returning home at a late hour of the night and was suspected to be a thief and beaten by the appellants.

The superior court not only failed to direct the assessors or itself regarding the circumstances under which the appellant was assaulted but also failed to direct the assessors or itself of the possible defence of

manslaughter. The trial court has a duty to deal with alternative defences which emerge from the evidence which reduce the charge to manslaughter even though they are not put forward by the defence (see *Okeyo Kigen vs. Republic* [1965] EA 188; *Kioko vs. Republic* [1983] KLR 289).

The superior court erred in law by failing to direct itself or the assessors on the defence of manslaughter which clearly emerged from the evidence. We agree that the evidence proved a charge of manslaughter and not murder.

On sentence, we have taken into account the fact that the appellants have been in custody since 28th November, 2003 when they were convicted and sentenced which is a period of about 5 years.

In the result, we set aside the conviction for murder and substitute therefor a conviction for manslaughter contrary to *section 202 (1)* as read with *section 205* of the Penal Code and sentence each appellant to 15 years imprisonment with effect from 28th November, 2003.

Dated and delivered at Nairobi this 4th 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

A. ALUOCH

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR