REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT ELDORET

CRIMINAL APPEAL 340 OF 2006

ELIUD BARAZA WABOMBA……APPELLANT

AND

REPUBLIC ……RESPONDENT

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

Kitale (Karanja, J) dated 29th November, 2006

in

H.C.Cr. C. No. 42 of 2003)

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JUDGMENT OF THE COURT

Eliud Barasa Wabomba, hereinafter "***the appellant***", was tried before Lady Justice Karanja sitting with the aid of assessors, on a charge of murder contrary to ***section 203*** as read with ***section 204*** of the Penal Code. The particulars contained in the information charging the appellant with murder were that on 15th day of September, 2003 at Matunda Sub-Location, Moi's Bridge Location in Lugari District within Western Province, the appellant murdered No. 81942 Police Constable ***Benard Sitienei,*** hereinafter "***Benard".***

During the appellant's trial before the learned Judge and the assessors, a total of seven witnesses gave evidence on behalf of the Republic. Of those seven, six were police officers who were at the time of the alleged offence, stationed at Matunda Police Station. Those police witnesses were Police Constable William Busienei (PW1), Police Constable Abdi Asman (PW2), Police Constable Richard Boit, (PW3), Police Constable Christopher Birgen (PW4), Police Constable Daniel Kiptoo (PW6) and Chief Inspector of Police Joseph Arasa (PW7). The only non-police witness was Dr. S. Kozlova (PW5) who performed the post-mortem on the body of Bernard at the Moi Teaching and Referral Hospital Mortuary on 19th September, 2003. At the time of his demise, Benard himself was also a Police Constable attached to Matunda Police Station. At the conclusion of the prosecution's case the appellant was placed upon his defence and he chose to testify before the Judge and the assessors on oath. He called no witness. The learned Judge, after hearing such submissions as the parties chose to make before her, ably summed-up the case for the assessors as the law then required and each assessor, after deliberation, found the appellant guilty of the lesser offence of manslaughter. The learned Judge, however, in a reserved judgment, disagreed with the assessors as she was entitled to do, and found the appellant guilty of murder. She duly sentenced the appellant to the only penalty provided under the law, namely death. The appellant appeals to the Court against the learned Judge's conviction and sentence and in his home-made Memorandum of Appeal, the appellant listed a total of five grounds as the basis for his complaint against the decision of the trial court. Those grounds are:

> "**1.** ***THAT: Your Lordships I pleaded not guilty.***
>
> ***2. THAT: My Lords the learned trial Judge erred in law and facts when she relied on the prosecution case which was not proved beyond all reasonable doubts.***
>
> ***3. THAT: My lords the learned trial Judge erred in law and facts when she relied on a prosecution case which was poorly investigated.***

4. THAT: My lords the learned trial Judge erred in law and facts when she rejected my defence with no justified grounds of merit.

5. THAT: My lords I pray to be furnished with copies of the trial proceedings to enable me raise more grounds at the hearing of this appeal.

REASONS WHEREFORE: I pray that this appeal be allowed, conviction quashed the sentence of death set aside and I be set at liberty."

At the hearing of the appeal, learned counsel Mr. Nicholus Bichanga appeared for appellant before us and argued grounds one to four on behalf of the appellant. Mr. Bichanga abandoned ground five but there was really nothing to argue on that ground as it became spent when the appellant and his counsel were supplied with the record of proceedings in the superior court. Nor was there anything to argue in ground one; it is correct, as stated in that ground, that the appellant pleaded not guilty to the charge of murder. Accordingly, Mr. Bichanga only argued grounds two, three and four. Mr. Omutelema, the learned Senior Principal State Counsel, supported the judgment of the superior court and asked us to confirm the conviction and sentence.

This being a first appeal to us, the law requires us to re-examine and re-evaluate all the evidence placed before the trial court, and to draw our own conclusions from that evidence in deciding the question of whether or not we should uphold the decision of the superior court. In doing so, the law also places upon us the duty to bear in mind the fact that we have neither seen nor heard the witnesses who testified in the superior court and that that court had the advantage of assessing their demeanour and, in short, that the trial court, as it were "***had the feel of the case***". Our Court as an appeal court and though the appeal be a first one, is confined only to the dry recorded word and we must bear in mind that aspect of the matter. That principle is now well settled in our law and if any authority is required to buttress it, we would cite ***OKENO V REPUBLIC [1972] EA 32***.

What was the case put forward by the prosecution and on which the appellant was convicted?

It was agreed on both sides of the divide that the appellant had been arrested on 13th September, 2003; the reason for his arrest was an allegation that he had stolen secondhand clothes at some market. Upon arrest, the appellant was taken to Matunda Police Station and was kept in the cells there. He was supposed to be taken to court to answer the charge of theft on 15th September, 2003. In the morning of 15th September, 2003 the deceased Benard, and Pc. Christopher Birgen (PW4) were on duty at the Police Station's Report Office. There were thirteen prisoners including the appellant, in the police cells. Christopher saw the appellant for the first time during the morning of 15th September, 2003. Benard was busy escorting the prisoners from the cells to a pit latrine some fifty metres from the office block to relieve themselves. The appellant was the third person to be so escorted by Benard. Benard was not armed. As Benard was escorting the appellant Christopher was called to the petty crimes office and when Christopher returned to the report office, he found Constable William Busienei (PW1) standing there. William informed Christopher that the appellant had escaped and Benard had followed him into a nearby maize plantation. William said he had received the information about the escape from the OCS. It appears from the evidence of Christopher that he ran out first to go and help in the chase and that William followed him shortly thereafter and caught up with him. When the two could not find the appellant and Benard, Christopher left William and went back to the station to bring a police dog to help in the search. Christopher returned to the search with a dog and its handler and it was his evidence that in the maize plantation he came upon a jacket which was identified as that of the appellant. The jacket had appellant's identity documents and it appears that upon the finding of that jacket Christopher once again returned to the police station, left the jacket there and then resumed the search.

Meanwhile William and others continued with the search. There is a river some 200 metres from the police station and the river is called "***Mtooni Police"***, apparently because of its proximity to the police station. William and other officers discovered the body of Benard floating in that river. The body was still dressed in full police uniform. According to the police witnesses, the appellant was nowhere to be found. The body had injuries on the eyebrow and at the back. There were also finger-nail marks around the neck. The body was removed and transported to the hospital mortuary where Dr. Kozlova (PW5) did the post mortem.

Back on the scene of the death C.I. Joseph Arasa (PW7) took control of investigations. His evidence is at variance with that of Christopher as to who recovered the jacket which was said to be that of the appellant. As we have seen, Christopher said he recovered the jacket, took it to the police station and left it there. Christopher does not say that Chief Inspector Arasa was with him at that stage. Arasa's evidence with regard to the jacket was as follows:-

"... At approximately 7.30 a.m. Pc. Birgen informed me that one of the prisoners had escaped. He told me that Pc. Sitienei had escorted a prisoner to the latrine outside but as he was coming back, the prisoner took off to the main road and escaped. He was in a panic. I raised the alarm by whistling. We followed. Other officers who were outside the police station also started running after the prisoner. We ran to the maize plantation. We started searching in the maize. I reached a place which looked disturbed showing that there had been a struggle. I found this jacket there. This is the jacket (MFI-2 identified). The maize had been felled, and the grass had been flattened at the scene. When I talked to the prisoner that morning he was wearing this jacket. I am the one who recovered it. I wish to produce it as Exhibit – marked as Ex. No. 2.

I searched the pockets; I found a punch (sic) in which was an identity card and voter's card and some other papers. We then continued with the search ..."

The continued search led to the discovery of the body in the river and when the body was removed the Chief Inspector saw two cuts above the eye-brow, finger-nail marks on the neck and injury in front of the left shoulder.

We should point out that at the very beginning of his evidence, C.I. Arasa had stated that on the date in issue i.e. 15th September, 2003, he had reported to his office at approximately 6.20a.m. and he continued as follows:-

> "***I checked the prisoners in the cells to confirm if anybody had a problem. You talk to them one by one. There were 13 prisoners. I talked to them one by one. I talked to one suspect called Eliud Wabomba Barasa. He was of stealing contrary to section 275 P.C. He is accused in the dock. He is said to have stolen but investigations were not complete. He had no problems. We had officers in the sentry Pc. Sitienei and Pc. Birgen (PW4). Pc. Sitienei who was supposed to take prisoners out if they needed to attend the call of nature or attend to their relatives when they came. He was the cell sentry. ..."***

After the body of Benard had been delivered to the mortuary, Chief Inspector Arasa and his officers continued to look for the appellant. On the search for the appellant, Arasa's evidence was as follows:-

> "***... I scrutinized the Identity and other papers. I noted that the accused was from Namanjalala Area. I got a motor vehicle and mobilized my officers. We got the Chief. We went to the Chief's office and checked the records there. We saw the accused had taken the identity (sic) from there and he was from Umoja Village. We went to Umoja. There were some Village Elders who took us to the house of accused's brother. It was exactly midnight. There were two houses. One group guarded the other house. I was in the group that went to the brother's house. We knocked and identified ourselves. His brother opened for us. Accused was sleeping on a bed. The brother and his wife were sleeping on the floor. Accused was deep asleep. We woke him up. We told him we were police officers. We hand-cuffed him. We led him to the motor vehicle. He attempted to escape. He started running while hand-cuffed. We chased him and took him to the Land-Rover. We also arrested his bother. We left the wife. We took him to Matunda Police Station. We placed him in the cells. The following morning, I recorded a statement under inquiry from the accused and his brother. ..."***

During the post mortem Dr. Kozlova found that Benard had died from strangulation by hands followed by drowning. In the course of the examination of the body the Doctor found:-

- ***Multiple bruises on the neck, and the bruises were of a semi-lunar shape;***
- ***Abrasion due to the pressure of nails of the fingers;***
- ***Massive heamorrhage immediately under the neck;***
- ***Classical features of drowning and that Benard might have been strangulated to lose consciousness and then drowned in the water;***
- ***Everything was done when Benard was alive and the date of death was indicated as 15.9.03.***
- ***The body was very well preserved***.

In the Doctor's opinion.

> "***... the strangulation was by hands ..."***

So that the prosecution's case, put in a nut-shell, was that in the morning of 15th September, 2003, the appellant was one of the thirteen prisoners in the cells at Matunda Police Station. Around 6.30 a.m. C.I. Arasa inspected the cells and spoke to the appellant. The appellant was wearing the jacket which C.I. Arasa produced in Court as Exhibit 2. Bernard the deceased was the cell-sentry. Benard took out the appellant from the cells to a latrine some fifty metres away. In the course of the journey the appellant ran away with Benard in hot pursuit. The pursuer and the pursued disappeared in maize plantation. The police officers at the station led by C.I. Arasa mounted a search and the body of Benard was subsequently found floating in the nearby river. The appellant was nowhere to be seen but later in the night C.I. Arasa and his team traced him in his brother's house and arrested him. He was once again taken back to Matunda Police Station and it being established by Dr. Kozlova that Benard had been strangled by hands and then drowned, the appellant was charged with Benard's murder.

What was the appellant's answer to all these allegations? As we said earlier he gave sworn evidence which was as follows:-

> "***I stay at Namanjalala. I am a trader. I sell clothes in various places in Town. On 15.9.2003 I was at Matunda Police Station. I had been arrested and detained to (sic) offence of stealing clothes. I was called in the office of the OCS. He started interrogating me. I was then returned to the cells. At 2p.m. I was removed from the cells by a police officer called Maina. He took me to another office he beat me up and forced me to record a statement. I was tortured and forced to sign it. I was then brought to court with the offence of murder. I denied it before the trial court. I still deny it. I do not know anything about the murder charge. The jacket which was produced here was not mine. I never left the police station from the time I was arrested upto when I was brought to court.***
>
> ***The Identity Card and pouch (****sic****) was left at the OB Desk when I was booked in for the offence of theft of***

clothes.

I was never released from police custody and I never escaped as alleged".

The appellant repeated these assertions when he was cross-examined by Mr. Mutuku who was in charge of the prosecution's case in the superior court. He denied that he saw Benard that morning, that he ever visited the latrine as alleged, that he was arrested in his brother's house and such like allegations by the prosecution witnesses.

In arguing the appeal before us, Mr. Bichanga submitted that the entire prosecution evidence was not "***corroborative***" by which expression we understood the learned counsel to mean that the prosecution evidence was not consistent. "***Corroboration***" is a term of art which applies to, for example, the evidence of accomplices, or that of minors and as Mr. Omutelema correctly pointed out to us, the evidence of the police officers who testified herein did not require corroboration. None of them was said to be an accomplice though Mr. Bichanga obliquely implied that William Busienei (PW1) could have had something to do with the death of Benard. There is absolutely nothing on the recorded evidence from which one could conclude that that witness could have been involved in the death. Like all the police officers who testified, he obviously came on the scene after Chief Inspector Arasa had raised the alarm. Merely because William was the first person to be at the police station and to see the body of Benard in the river cannot form a basis for the conclusion that he might have been involved in the death of Benard. We agree with Mr. Omutelema that none of the police witnesses was in any way an accomplice in the death of their colleague and the evidence of the witnesses did not and does not require corroboration.

On the issue of consistency, Mr. Bichanga pointed to the conflict in the evidence of Christopher (PW4) and C.I. Arasa (PW7) with regard to who actually found and took possession of the jacket said to belong to the appellant. Christopher swore he found the jacket, took it to the station and left it there. Arasa said it was him who did so. If the appellant had agreed that the jacket was his, probably this inconsistency would have been material. But as we have seen the appellant himself says the jacket is not his; he does not claim that he had left it at the police station and therefore could not have been at the spot where it was alleged to have been found. So that whether it was Christopher who found the jacket or whether it was C.I. Arasa who found it cannot really matter in the case. It is also clear to us from the recorded evidence that there was clearly panic at the police station after Arasa had raised an alarm about an escaped prisoner and in that kind of confusion the witnesses cannot be expected to be too meticulous as to which one of them did what and at what stage. In our view, the important question to determine and which the learned Judge and the assessors determined was whether the appellant escaped from the police station that morning and whether the deceased chased after him intending to recapture him. On this point the learned trial Judge found as follows:-

> "***I am therefore satisfied from the evidence on record that the accused person was at the police station on the morning in question that he escaped and was chased by the deceased and the other police officers; that his jacket in which his identity card and other documents were was recovered in the maize plantation near the river where the deceased's body was recovered; and that the accused was arrested the same evening from his brother's house by the police officers. …"***

In our view, these conclusions were inevitable because of the nature of the evidence adduced by the prosecution, weighed against the defence put forward by the appellant.

Each of the six police officers who testified in the case stated in his own way how they participated in the chase after, and the search for the appellant and the deceased who had followed to recapture him. At no stage was it ever suggested to any of these officers that their chase and search was an uncalled for folly because the appellant was all along comfortably sitting in the very police cells from which he was alleged to have escaped. It is simply not possible and there is really no plausible reason or motive that would have made the six police officers manufacture the story about the escape, the search and the midnight arrest of the appellant at his brother's house. These events obviously took place and we would, like the learned Judge and the assessors did, reject any suggestion that they were a concoction from the fertile and wicked imagination of the minds of the six police officers. They would have no reason for making up the story.

We also accept the position that in the morning of 15th September, 2003, the appellant escaped from Benard who had led him to a latrine, that Benard pursued him unarmed, that at some stage Benard caught up with the appellant and a struggle ensued between the two during which the appellant removed his jacket, strangled Benard using his hands and then threw Benard into the water while he (***Benard***) was still alive. We agree with the learned Judge's comments that:-

> "***… if somebody strangulates another, renders him breathless and drowns him in a river and leaves him there that person clearly intends to kill the other, or he does not simply care whether the person will drown and die, or whether he will hang onto some straws and survive. When the accused strangulated the deceased and immersed him into the water, he may have wanted to kill him, or he may have wanted to immobilize him so he could stop him from chasing him but he was indifferent if his act culminated in the death of the deceased or not …"***

Of course nobody saw the appellant do any of these stated things and that must be why everybody agreed in the superior court and even in this Court that the prosecution evidence was entirely circumstantial. The learned trial Judge correctly dealt with the issue of circumstantial evidence and nobody challenged before us the Judge's appreciation of the nature of such evidence and what constitutes it. We need not deal with that issue. The circumstances upon which the prosecution relied and which the learned Judge and the assessors accepted were that the appellant was escaping from police custody and Benard pursued him to prevent the escape. The appellant was the last person to be seen with Benard and shortly thereafter Benard's body was found floating in the river and when Dr. Kozlova examined the body, she found that Benard had been strangled by hand and then thrown into the river where he drowned. The appellant whom Benard had been chasing was nowhere to be seen and was later arrested at night in his brother's house. The jacket which C.I. Arasa had seen him wearing that morning was found

abandoned within the vicinity of the river.

In our view these circumstances conclusively proved the charge against the appellant beyond any reasonable doubt. Even if the inquiry statement which the appellant made to C.I. Arasa were to be wholly ignored, the other evidence on record proved the charge to the standard required by law. It does not matter that neither the appellant's brother nor that brother's wife were called to testify. It does not equally matter that the Chief and the other people who led the police to the house of the appellant's brother were not called to testify. The evidence of those persons would have added or taken away nothing from the prosecution's evidence already or record. We have also looked at the authorities which Mr. Bichanga cited to us in support of the appellant's case. With respect to Mr. Bichanga those authorities do not add anything useful to the appellant's case. On our own independent assessment of the recorded word we are satisfied it was proved beyond any reasonable doubt that it was the appellant who killed Benard. The purpose or motive for killing Benard was to enable the appellant escape from the lawful custody of the police. The appellant clearly had malice aforethought and like the learned trial Judge, we do not understand the assessors' opinion that the appellant was only guilty of manslaughter. The appellant was clearly guilty of murder. The sentence of death was and still is the only lawful one for the offence of murder. This appeal must accordingly fail on the issues of conviction and sentence. We order that the appeal be and is hereby dismissed.

Dated and delivered at ELDORET this 26th day of September, 2008.

R.S.C. OMOLO

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JUDGE OF APPEAL

E. M. GITHINJI

……..

JUDGE OF APPEAL

J. ALUOCH

……

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR