



**IN THE COURT OF APPEAL OF KENYA**

**AT ELDORET**

**CRIMINAL APPEAL 341 OF 2006**

ANTHONY SIMIYU MASASABI ..... 1<sup>ST</sup> APPELLANT

JB ..... 2<sup>ND</sup> APPELLANT

NK..... 3<sup>RD</sup> APPELLANT

DN ..... 4<sup>TH</sup> APPELLANT

DAVID WANJALA ..... 5<sup>TH</sup> APPELLANT

AND

REPUBLIC ..... RESPONDENT

*(Appeal from the conviction and sentence of the High Court of Kenya at Kitale (Wanjiru Karanja, J) dated 7<sup>th</sup> December of 2006*

In

**H.C. Cr. C. No. 19 of 2001)**

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**JUDGMENT OF THE COURT**

In this appeal there were originally seven people charged with murder contrary to **section 203** as read with **section 204** of the Penal Code but two of the accused persons died before the trial so that the final charge sheet had the following particulars of the offence :-

“1. **DAVID WANJALA** 2. **JB**

3. **NK** 4. **DN**

5. **ANTONY SIMIYU: On the night of 2<sup>nd</sup> February 2001 at Oramba farm in Trans-Nzoia District within Rift Valley province jointly with another not before court murdered BENJAMIN KIBET CHELIMO.”**

The trial commenced on 3<sup>rd</sup> June 2004 before Wanjiru Karanja, J., who sat with the assistance of the assessors as the law provided that time. The summary of the evidence adduced before the superior court was as follows:-

DN (4<sup>th</sup> accused during the trial) was the deceased’s friend but the deceased appeared rather reluctant to continue with the relationship. The deceased’s mother Ann Chepkurgat (PW4) did not approve of the said relationship between the deceased and DN. On the material day (2<sup>nd</sup> February, 2001) Dorcas went to the deceased’s home where she found him with his friend Juma Mukolongolo (PW7). According to Juma (PW7) Dorcas was shouting “Benja, Benja.” The deceased’s name was Benjamin Kibet Chelimo. The deceased tried to pull DN into the house but as the two struggled DN managed to free herself and ran towards the fence from where she started throwing stones onto the roof of the deceased’s house. The deceased’s mother (PW4) heard the noise and inquired as to what was happening. It was then that the deceased and PW7 decided to run after DN who ran and entered the house of Antony Simiyu Masasabi (1<sup>st</sup> appellant herein). The other appellants – JB (2<sup>nd</sup> appellant), NK (3<sup>rd</sup> appellant) and DN (4<sup>th</sup> appellant) were inside the house where there was dancing and drinking of alcohol. The deceased followed Dorcas into the house and started pulling her out. Juma (PW7) was left standing at the door from where he saw the appellants intervene and they started beating the deceased. Juma then went inside the house and pulled the deceased and they both started running away as the appellants chased them. The two (PW7 and the deceased) ran to the nearby A.P. Camp where they reported that they

had been beaten by the appellants. The Administration policemen refused to help the two asking them to report the incident the following morning. From there the two went to the house of Wycliffe Kipkemoi Mukanda (PW3) where they found the deceased's sister Pamela Chebet Kiplimo (PW1) and joined them in watching T.V. Thereafter the deceased and PW7 decided to go home and on their way home they met James Barasa (2<sup>nd</sup> appellant) who started screaming as a result of which his father (1<sup>st</sup> appellant) came out armed with a panga and a rungu. The appellants then set upon the deceased and PW7 whom they beat badly. PW7 testified that he was able to recognize all the appellants as they beat the deceased. PW7 went back to the AP's camp to report the incident but he was told to go back the following morning. According to PW7 the 4<sup>th</sup> appellant (DN) was not armed but merely stood there watching as the other appellants attacked PW7 and the deceased.

When the A.P's refused to give any assistance, PW7 decided to go back to the house of Mukanda (PW3) and informed him and Pamela (PW1) what had happened to the deceased. They all went back to the scene but could not trace the deceased. The following morning the body of the deceased was found dumped near the house of the 1<sup>st</sup> appellant. The body had a deep cut wound on the head. The appellants could not be traced and the matter was reported to the police who removed the body of the deceased from the scene and caused postmortem examination to be conducted. According to the postmortem report the cause of death was "cardiopulmonary" failure due to occipital epidural hemorrhage due to head injury."

In their defence all the appellants admitted that they were in the 1<sup>st</sup> appellant's house on the material night. They admitted the first incident in which the deceased and Juma (PW7) on one hand and the appellants on the other had fracas. According to the 1<sup>st</sup> appellant he went to the house of the 2<sup>nd</sup> appellant where he slept. He said that when he went back to his home the following morning he found his father already arrested. According to 2<sup>nd</sup> appellant he left the scene and went to his house to sleep. The 3<sup>rd</sup> appellant stated that he too left the scene only to be arrested two days later. The 4<sup>th</sup> appellant denied any involvement in the incident in which the deceased was killed. The 5<sup>th</sup> appellant, like the rest, admitted the first incident but denied being involved in the killing of the deceased.

The learned Judge of the superior court considered the evidence before her and in the end came to the conclusion that the prosecution had proved its case against each of the appellants beyond reasonable doubt in that they jointly participated in the unlawful killing of the deceased. In the course of her judgment the learned Judge stated:-

***“On the first issue, it is noted that according to PW7, there was ‘bright moonlight’ that night and that he could therefore see clearly and identify the surroundings and the objects. My finding also is that the witness had seen the accused persons and others earlier the same night. He described with clarity what each and every one of the accused persons was armed with. My finding therefore is that the circumstances pertaining at the scene were conducive to a positive identification of the accused persons. On the second issue, which is correlated to the first one, my finding is that the witness knew all the accused persons very well before as they were all neighbours. He had also seen them earlier the same evening during the first incident which is admitted by the accused persons. His identification of the accused persons was in my well considered view identification by recognition rather than visual identification. The issue of identification by recognition as opposed to visual identification was discussed by the Court of Appeal in the case of ANJONONI VS. REPUBLIC (1980) KLR – 59 where it was held :-***

***“Being night time the conditions for identification of the robbers in this case were not favourable. This was, however, a case of recognition, not identification of the assailants; recognition of an assailant is more satisfactory, more assuming and more reliable than identification of a stranger because it depends on the personal knowledge of the assailant in one form or other.”***

The learned Judge cited the cases of RORIA V. R. (1967) E.A. 584 and KARANI V. R. (1985) KLR 298 on the issue of evidence of identification by a single witness, and then went on to consider the evidence of Juma (PW7) as follows:-

***“In this case, I have considered all the circumstances surrounding this identification. As stated earlier, the witness knew the accused persons very well before, there was sufficient light at the scene from the moonlight plus the fact that the witness had been with the same accused persons just a few hours earlier at the same scene. I observed PW7 as he testified. He struck me as a truthful witness. His evidence was credible, forthright and creditworthy. He told the court the truth. Having warned myself of the danger of basing a conviction on the evidence of a single witness, and having considered the evidence of PW7 and the circumstances pertaining to this case, I am satisfied that his evidence can be relied upon to convict without any danger whatsoever.”***

Having so stated, the learned Judge concluded her judgment thus:-

***“I have considered the entire evidence on record including the defence tendered by the accused persons herein. I have assessed their evidence and found that they were not telling the truth. From the totality of the evidence on record, I am satisfied that the prosecution has proved its case against all the accused persons beyond any reasonable doubt. I, like the assessors find them all guilty as charged and I convict them accordingly.”***

When it came to sentencing of the appellants the learned Judge very properly considered the age of each appellant and those who were under 18 years old were ordered to be detained in prison at the pleasure of the President. These were JB (2<sup>nd</sup> appellant) NK (3<sup>rd</sup> appellant) and DN (4<sup>th</sup> appellant). Anthony Simiyu (1<sup>st</sup> appellant) and David Wanjala (5<sup>th</sup> appellant) were sentenced to death as mandatorily provided by law.

It is from the foregoing that the appellants now come to this Court by way of first appeal, and that being so, it is our duty to reconsider the evidence re-evaluate it and come to our own conclusions, but always remembering that we have neither seen nor heard the witnesses and giving allowance for that – see OKENO V. R (1972) E.A. 32.

When this appeal came up for hearing before us on 23<sup>rd</sup> September, 2008, Mr. D.R. Omboto appeared for the 1<sup>st</sup> appellant, Mr. Angu Kitigin for the 2<sup>nd</sup> appellant, Miss J.A Wanjala for the 3<sup>rd</sup> appellant, Mr. J.C.K. Cheptarus for the 4<sup>th</sup> appellant and Mr. A.K. Chepkwony

for the 5<sup>th</sup> appellant. Mr. A. J. Omutelema, the learned Principal State Counsel, appeared for the State.

Mr. Omboto submitted that the learned Judge failed to evaluate the evidence before her and that there was a mix-up in the proceedings so that it was not clear as to who was the 1<sup>st</sup> accused and/or the 5<sup>th</sup> accused. On the issue of identification, Mr. Omboto submitted that the prevailing conditions at the time of the offence were not favourable for a correct identification.

Mr. Kitigin submitted that there was the evidence of a single witness and that it was not clear whether it was recognition or identification. Mr. Kitigin went on to submit that there was no intention to kill and for that reason the charge ought to have been reduced to manslaughter.

Miss Wanjala on her part associated herself with the submissions of her two colleagues.

Mr. Cheptarus submitted that from the evidence his client (Dorcas) was merely at the scene but took no part in injuring anybody.

Mr. Chepkwony associated himself with the earlier submissions made by his colleagues only adding that the case had not been properly investigated as some of the key witnesses were never called.

Mr. Omutelema in supporting the convictions of all the appellants except the 4<sup>th</sup> appellant submitted that the issue of identification was addressed by the learned Judge in that the key witness (PW7) knew the appellants hence this was a case of recognition. Mr. Omutelema further submitted that the appellants were all armed and were attacking the deceased so that it was immaterial as to who inflicted the vital injury.

As regards the 4<sup>th</sup> appellant, Mr. Omutelema did not seek to support her conviction as, in his view, she could not be held responsible.

In this appeal we have endeavoured to give a summary of the evidence before the learned Judge. It is our duty to reconsider that evidence, re-evaluate it and make our own conclusion based on that evidence – **OKENO VS. R** (supra). We have also considered the submissions of the four advocates appearing for their respective clients. Finally, there are the submissions by Mr. Omutelema. We have considered all these and what emerges therefrom is that this was a case which was, and had to be decided essentially on the evidence of a single witness – Juma Omukolongolo (PW7). There was the evidence of Pamela (PW1). We have considered the evidence of identification, the reasoning of the learned Judge and the submissions of the learned counsel appearing and we are of the firm view that the learned Judge carefully considered the evidence and came to the correct conclusion that this was, indeed a case of recognition. Juma (PW7) knew all the appellants. He was with some of them right from the first incident to the second incident of beating the deceased. we agree with Mr. Omutelema that this was a case of common intention so that the question of who among the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> appellants caused the fatal injury does not arise. This is the situation covered by **section 21** of the Penal Code which provides:-

***“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”***

We, however, find no evidence to connect the 4<sup>th</sup> appellant (Dorcas) with the offence since, although she may have been the source of the problem in that the quarrel was over her actions that seem to have provoked the deceased, she never participated in beating the deceased. For that reason we allow her appeal, quash the conviction and set aside the sentence passed on her. She is to be released from prison forthwith unless otherwise lawfully held.

As regards the other appellants we are satisfied that they were convicted on very sound evidence and we have no reason to interfere. The sentences imposed were lawful and we have no basis to interfere. Their appeals are accordingly dismissed. Those shall be the orders of this Court.

Dated and delivered at Eldoret this 7<sup>th</sup> day of November, 2008.

**E.O. O’KUBASU**

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**JUDGE OF APPEAL**

**J.W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

**J. ALUOCH**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR.**