REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT MOMBASA

Criminal Appeal 267 of 2006

KARISA WARA ……..APPELLANT

AND

REPUBLIC ……..……..……...RESPONDENT

****

JUDGMENT OF THE COURT

KARISA WARA, the appellant herein, was tried before Ouko, J. sitting with the aid of assessors at the High Court of Kenya at Malindi on an Information charging him with the offence of murder contrary to ***section 203*** as read with ***section 204*** of the Penal Code. At the conclusion of his trial and after the learned trial Judge had summed-up the case to the three assessors, all of them returned a unanimous verdict of not guilty to the charge. However, by his judgment dated and delivered on 30th November, 2005, the learned Judge disagreed with the verdict of the assessors, found the appellant guilty of murder and proceeded to sentence him to death as provided under ***section 204*** of the Penal Code. We have already pointed out the impropriety of not giving an accused person convicted of an offence carrying a mandatory death sentence the right to move a motion in arrest of judgment or why sentence should not be imposed as by law required - see **KENGA FOTO MANGI v REPUBLIC, Criminal Appeal NO. 259 of 2006 (unreported)** delivered at Mombasa on 19th January, 2007. We do not wish to repeat what we said therein and we hope trial Judges will forthwith stop the practice of straightaway imposing sentence in their judgments without giving an accused person the right to be heard before the sentence is passed. As we pointed out in the case cited, there may well be good legal reasons why the mandatory death sentence ought not to be passed.

The Information upon which the appellant was tried and convicted stated in its particulars that on the 17th day of November, 2004 at Kakoneni Centre, Kakoneni Sub-location within Malindi District of the Coast Province, the appellant murdered ***Kazungu Baya Nyundo***, hereinafter "*the deceased*." In proof of its charge, the prosecution called a total of nine witnesses, and in his defence the appellant made an unsworn statement and called no witnesses. Following his conviction and sentence of death, the appellant has now come to this Court on a total of four grounds of appeal, namely: -

"**1. That the learned High Court Judge erred in law and fact to convict the appellant in reliance of hearsay evidence adduced by (P.W.5) the sub-chief without putting to account that: -**

(i) That the alleged occurred (sic) at nights (sic) and therefore the conditions could not favour the deceased for a positive visual identification.

(ii) The same was based on a hearsay (sic) evidence.

(iii) That only a single witness alleged the same.

(iv) The same was not proved beyond any reasonable doubt.

2. That the exhibit produced was not taken for a proper analysis or a fair examination.

3. That the alleged occurred (sic) at a beer drinking place and thereby a lot of insane (sic) took place around.

4. That the investigating officer was not summoned to clear doubts in this matter."

These were the grounds which were briefly argued on behalf of the appellant by Ms. Abuodha, counsel instructed by the Court to appear for the appellant.

The brief facts of the case were that during the night of 17th November, 2004, a group of people were drinking palm wine in the home or club of ***Mwenda Mwangangi Ngala*** (P.W.1). Ngala was selling liquor to the various drinkers and as such one would not expect him to stay at any particular spot for any length of time. Among the people were the deceased, the appellant, ***Riziki Danson Charo*** (P.W.2) and ***Kazungu Katana Male*** (P.W.3). According Male (P.W.3) the appellant arrived at the drinking place at 9.30 p.m. At that time (9.30. p.m.) or at 10.00 p.m. ***Charo*** (P.W.2) and ***Male*** were leaving the drinking place and they were all drunk. After leaving the place, it would appear that the two men and the deceased realized that Charo had lost his match-box at the drinking place. The three went back to look for it and they asked Ngala the owner of the place, about the match-box. Ngala had not seen it and the three men were about to leave and come to look for the match-box the following day. As they were leaving or were about to leave, the appellant appeared and asked Charo why Charo was saying the appellant had stolen the match-box. Charo denied having made such an accusation. The appellant then pushed Charo and Charo fell down. Charo felt pain on the hand and on checking he found that he had a stab wound. The deceased who was nearby asked Charo why he was lying down. Charo told the deceased he (Charo) had been stabbed by the appellant and according to Charo, the appellant jumped towards the deceased, stabbed him with a knife and then ran away. The deceased was stabbed on the stomach. The deceased cried out and many people came. That was the version given by Charo. The version given by Male (P.W.3) was, however, different. According to Male, while they were leaving, the appellant asked Charo why Charo was accusing him of the theft of the match-box. Charo denied having so accused the appellant. The appellant pushed Charo and the later fell down. The deceased asked Charo to get up so that they could leave; Charo replied that he had been stabbed. The deceased asked if the appellant had a knife. The appellant confirmed that he had a knife. Then according to Male the appellant started to run away and the deceased chased him. The deceased returned from the chase and fell down. The deceased did not say anything and Male went to his home and told his wife what had happened. He later returned to the scene with his wife but found nobody.

James Kahindi Kitsutsu (P.W.6) was a neighbour of Ngala. James heard the commotion and ran there. According to James, the time was 10.00 p.m. He found the deceased lying down and holding his chest. James asked him what had happened and according to James, the deceased said the appellant had stabbed him. James then went to the assistant chief ***Robert Safari Charo*** (P.W.4) and reported the matter. The following day James met the appellant and arrested him. The appellant gave James a knife and that knife was produced before the Judge.

On being told by James what happened, the assistant chief left to go to the scene but on the way he met the deceased being taken to hospital. According to the assistant chief, he spoke to Charo and Charo told him what had happened. The deceased also told him that he had been stabbed with a knife by the appellant. It was agreed on the evidence that the deceased died on his way to the hospital.

In his unsworn statement the appellant told the court that on 17th November, 2004, he went home from work and then went to a drinking pub. He drank enough palm-wine and at about 7.30 p.m. he left to go

home after taking two bottles of palm-wine. The following day, he learned that someone had been killed and then someone took him to the police station where he was charged.

That was the case the learned Judge and the assessors were required to adjudicate upon. The assessors decided the appellant was not guilty; the learned Judge said he was. The learned Judge dealt with the contradiction between Charo (P.W.2) and Male (P.W.3) as to where the deceased came to be stabbed whether immediately at the scene where Charo was stabbed as narrated by Charo himself or whether the deceased chased the appellant and then returned to say that he had been stabbed by the appellant. Having pointed out the inconsistencies, the learned Judge concluded: -

"…….**The accused was a local person and was in fact related to some of the witnesses. Apart from Riziki's evidence (P.W.2) no other witness saw the accused stab the deceased. The three witnesses who were present, as I have already stated, gave three different versions of what took place. Given these discrepancies, this case, therefore, fails (sic) to be considered on circumstantial evidence and the statement of the deceased just before he died."**

The learned Judge then considered the nature of circumstantial evidence; that Charo was himself stabbeb; that the incident took place at night; and that the appellant was known to all witnesses and so on. We note, for our part, that the appellant admitted having been in the home, that Ngala, Charo and Male all agreed that the cause of the dispute was over a match-box which Charo lost and over which the appellant alleged Charo had accused him of stealing. That kind of evidence was unlikely to be manufactured by the witnesses and it is not to be forgotten that the appellant himself admitted having been at the place. True the position of the "*lamp-tin*" as Ms. Abuodha chose to call it, was not stated as was the strength of the light it produced. But as the learned Judge correctly pointed out these people were familiar with each other and it is unlikely that they would be drinking in total darkness. Thus, the evidence regarding the appellant being seen was not by a single person (the deceased) as is being contended in Ground 1(iii). All the three witnesses said they saw the appellant and when James (P.W.6) went to the scene the deceased straightaway told him that it was the appellant who had stabbed him. The deceased having told the assistant chief (P.W.4) the same thing, passed away. This is what is being complained of as hearsay, but that evidence clearly amounted to a dying declaration and was admissible under ***section 33 (a)*** of the ***Evidence Act***, ***Chapter 80*** of the Laws of Kenya. The dying declaration required corroboration but it was amply corroborated by the presence of the appellant at the scene of the stabbing which not only involved the deceased but Charo as well. We accordingly see no reason to differ with the learned Judge's conclusion that it was the appellant who stabbed the deceased and caused his death. The complaint about the knife not being examined has really no validity. James (P.W.6) took away the knife from the appellant on 18th January, 2002, a day after the events. There was no evidence that when the knife was handed to James, it had blood-stains on it; there could not have been any blood-stains on the knife unless the appellant was intending to confess to the commission of the crime. No useful purpose would have been served by subjecting the knife to an examination. Nor can the failure to call the investigating officer carry the matter any further. ***Police Constable William Metto*** (P.W.9) was all along present with ***Pc Nyambati*** who was said to have been the investigating officer. Metto said he was assisting Pc. Nyambati and stated what happened during the investigations and we do not see what evidence, different from that given by Metto, would have been given by Nyambati if he had been called. Neither Ms. Abuodha nor the appellant told us what they thought Nyambati might have said if he had been called to testify. We reject those two grounds as well.

Did the appellant do so with malice aforethought? The stabbing was at a drinking den and in our judgment which is also being delivered to-day in the case of **SAID KARISA KIMUNZU v REPUBLIC, Criminal Appeal No. 266 of 2006**, we have extensively dealt with the effect of ***section 13(4)*** of the ***Penal Code*** and the learned Judge's total failure to direct the assessors and himself on the issue of drunkenness or intoxication. What we have said in that judgment fully applies to the circumstances of this appeal and in spite of Ms. Abuodha's views on the issue of intoxication, we are satisfied that we must do to this appellant what we did in the ***Kimunzu*** case. Accordingly, we allow this appeal to the extent that we set aside the conviction for murder under ***section 203*** of the Penal Code and substitute that conviction with one of manslaughter contrary to ***section 202*** of the Penal Code. We also set aside the sentence of death imposed under ***section 204*** of the Penal Code and substitute it with a sentence of ten

(10) years imprisonment to run from the date when the appellant was convicted and sentenced by the superior court. Those shall be our orders in this appeal.

Dated and delivered at Mombasa this 26th day of January, 2007.

R.S.C. OMOLO

……

JUDGE OF APPEAL

P.N. WAKI

……

JUDGE OF APPEAL

J.W. ONYANGO OTIENO

…….

JUDGE OF APPEAL

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

DEPUTY REGISTRAR