REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT MOMBASA

Criminal Appeal 256 of 2006

DZOMBO CHAI....……………………………………………….……..APPELLANT

AND

REPUBLIC……………………….……………………......…....……….RESPONDENT

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

Malindi (Ouko,J) dated 15th September 2005

in

H.C.CR.C. NO. 13 OF 2001

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JUDGMENT OF THE COURT

The appellant **DZOMBO CHAI** also known as **KAHINDI CHAI DZOMBO** and his brother **LEANARD CHAI** also known as **CHIVATSI CHAI DZOMBO** were jointly charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code before the High Court sitting at Malindi. They were alleged to have jointly murdered one KATANA CHIVATSI MUNGA (deceased) on 18th August 1997 at about 7p.m. It seems from the record that Leonard Chai escaped before the plea was taken. The appellant pleaded not guilty. The trial started before L.P. Ouna, J. on 17th October 2002 and after recording the evidence of one witness **KWEKWE KATAMA** the trial was adjourned. The trial resumed before Pamela Tutui, a Commissioner of Assize, on 2nd September 2003 who started the trial afresh. The trial was however adjourned on 4th September after five witnesses including **KWEKWE KATAMA** had given evidence. On 1st September 2004 the trial started afresh before W. Ouko, J. The prosecution called seven witnesses including KWEKWE KATAMA (PW2) (KWEKWE) who is the widow of the deceased. The appellant after trial was convicted and sentenced to death. This is a first appeal against the conviction and sentence.

The appellant is the son of **CHAI NZOMBO** who was a brother of the deceased in this case. His mother is **MOGENI WALUKO**. On the material day, **KWEKWE** (PW2) was going home from her shamba at about 5 pm when she heard the deceased screaming near home. She went close and saw the appellant and another person beating the deceased with a hammer. The appellant was hitting the deceased

with a hammer while the other person was cutting the deceased with a panga. She screamed and the assailants ran away. Many people gathered at the scene. Joseph Chivasi Katama (PW3) (Joseph) a son of the deceased who was bathing at a nearby river went to the scene after hearing the screams. He found his father lying outside his house in a critical condition. He had injuries on the face, chest and upper limbs. James Chivatsi Chai (PW6) (James) a nephew of the deceased also went to the home of the deceased. He found the deceased lying on a mat outside his house where he had been taken groaning in pain. The two hands of the deceased were fractured, the ribs were also broken and he had a deep cut wound on the left side of the face. The deceased told James that he had been attacked by **CHIVATSI CHAI DZOMBO** alias **MBOLEA** and his younger brother **KAHINDI DZOMBO CHAI DZOMBO**. James immediately made a report to **ALBERT NYOKA MUSUNGU (PW4**) (Albert), the Assistant Chief of the area. Albert received the report at about 7.30 p.m and went to the deceased's home. He found the deceased lying down with injuries including a deep cut in the head. He asked the deceased who his assailants were and the deceased gave the names of **CHIVATSI CHAI DZOMBO** and **KAHINDI CHAI DZOMBO**. The deceased was taken to Kilifi District Hospital at about 11 p.m but he died on the way to hospital. Albert, the Assistant Chief, reported the incident to Senior Sergeant Edward Kanyama (PW5) (Edward), at Kilifi Police Station on the following day i.e. 20th August 1997. Dr. Athins Mwadena (PW7) of Kilifi District Hospital performed a post mortem on the body of the deceased. The apparent age of the deceased was assessed at 75 years. The deceased had multiple injuries including deep cut wound on the left part of the mouth, fracture of humerus both sides, depressed chest, compound fracture of the skull with intra-cranial bleeding. The doctor formed the opinion that the cause of death was asphyxia due to strangulation of the neck and chest injury.

The circumstances of the arrest of the appellant are not clear. All we have is the evidence of Sgt Leonard Mbitsi (PW1) that on 28th September 1999 he collected the appellant from Bamburi Police Station and took him to Mtwapa Police Station for interrogation as a suspect. The appellant in his testimony narrated in detail the family history and raised a defence of ***alibi.*** He stated that at the time his uncle was murdered he was in Mtopanga, Mombasa where he was employed in a garage by one Aboo and that he was arrested after reporting off duty for being drunk and taken to the police station. He was however informed by police on the following day that his brother had murdered his uncle and that he was also a suspect. When his brother went to the Police Station to see him he was arrested. His brother ultimately escaped after he was taken to court for committal proceedings

The superior court believed the evidence of Kwekwe Katama that she identified the appellant and his brother as the people who attacked the deceased and said.

"**The incident according to Kwekwe took place at about 5pm. She was categorical that she was able to clearly see the deceased person's assailants. The assailants were people known to Kwekwe being her nephews. For those reasons, I find that the accused and his brother were clearly recognized by Kwekwe as the circumstances were such that accurate identification was possible and there was no room for error."**

The superior court in addition believed the evidence that the deceased made a dying declaration to three witness as to the identity of his attackers saying;

"**There was also the evidence of Joseph, James and Albert to the effect that deceased specifically mentioned the names of the accused and his brother as the persons who had attacked him.**

The circumstances of the statement made to the three witnesses by the deceased as to the cause of the injuries from which he would die later in the day is in consonance with the provision of section 33(a) of the Evidence Act to amount to a dying declaration…."

It is thus clear that the appellant was convicted on the basis of both the evidence for recognition by KWEKWE and on the basis of a dying declaration.

This Court has said on many occasions that the evidence of identification or recognition of an accused person should be tested with the greatest care and should be watertight to justify a conviction. It is also

recognized that there is a possibility for a witness to be honest but mistaken and for a number of witnesses to be all mistaken. **(see Kiarie v. Republic [1984] KLR 739**). Further, although evidence of recognition is more satisfactory, more assuring and more reliable than the identification of a stranger **(see Anjononi v R [1980] KLR 50),** such evidence should not only be credible but also should be free from any possibility of error before it can be relied on to implicate an accused person.

A statement by a dead person as to the cause of his death or as to the circumstances of the transaction which resulted in his death in cases in which the cause of death of the person comes in question is admissible under **section 33 (a)** of the Evidence Act. Although the court can in law solely rely on such evidence there is however a rule of practice that a dying declaration must be satisfactorily corroborated to justify a conviction (see **Choge v. Republic [1984] KLR 1**, **Kihara v. Republic [1986] KLR 473 Aluta v. Republic KLR 543**.) In the **Aluta** case(supra) this Court relying on **Olale and others v. Republic [1965] E.A 555** said at page 547 paragraph 10: -

"**A trial judge should approach the evidence of the dying declaration with necessary circumspection. It is, generally speaking very unsafe to base a conviction solely on the dying declaration of a deceased person made in the absence of accused and not subject to cross-examination, unless there is satisfactory corroboration."**

There are six grounds of appeal which in general challenge the credibility of the prosecution case. Ground 4 aptly summarizes the appellant's complaint thus: -

"**4. That the trial Judge erred in law and fact by failing in evaluating (sic) with much accuracy and see that the prosecution evidence was full of discrepancies and full of fatal contradictions which renders the whole evidence scanty and unworthy to sustain conviction and sentence against the appellant."**

Mr. Omollo learned counsel for the appellant argued all the six grounds together. He contended that **KWEKWE KATAMA** was not a credible witness because of the inconsistencies in her evidence and the contradiction in her evidence and the evidence she had given before in the previous proceedings. On the credibility of the evidence of dying declaration, Mr. Omolo referred to the contradiction in the evidence of one Albert, Assistant Chief who said that deceased named two persons and the evidence of senior sergeant Edward who said that the Assistant Chief gave him only one name.

We have a duty to re-evaluate and consider the evidence and come to our own independent finding bearing in mind that we did not have the advantage of seeing the witnesses. Kwekwe gave evidence on three occasions before three different Judges. The relevant evidence which was the basis of the conviction is the evidence she gave at the trial before W. Ouko, J. That evidence is comparatively the shortest of the three versions of evidence she gave on the three occassions. Although the evidence she had given before L.P. Ouna, J. and Pamela Tutui, Commissioner of Assize, is not material and cannot be considered as evidence against the appellant it can nevertheless be used to test the veracity of the evidence of the witnesses. Kwekwe said at the trial before W. Ouko, J. that she saw the deceased being attacked by the appellant and another person at 5 p.m. in daylight. The trial Judge believed that Kwekwe identified the appellant as it was during the day. Kwekwe however said before L.P. Ouna, J. and Pamela Tutui that she saw the deceased being attacked at 6.30 p.m. after sunset and that there was bright moonlight. She also said before Commissioner Pamela Tutui that when she saw the appellant beating the deceased she was hiding in a thicket about 50 metres from the scene and that the attackers could not see her as there was a thicket between her and the scene. She added that the attackers had their backs towards her and that she did not see them running away. She further testified that on arrival at the scene, she asked the deceased the identity of the persons who had attacked him and the deceased gave the names of the appellant and his brother. The reason for asking the deceased the identity of the attackers in her own words was: –

"**I had recognised the assailants but I wanted to gather more evidence."**

That is hardly logical.

Although Kwekwe Katama said that she knew the appellant and his brother since birth there was the evidence of James which was supported by the evidence of the appellant that the appellant was not born and brought up in the village. James said in part: -

"There was a dispute between the deceased and the family of the accused. The two suspects did not grow up in our village. Their mother had gone away with them while they were very young and returned. In fact the accused was not born in the village – but returned when they were adults. They were considered strangers at home. The dispute related to land. The accused and his brother wanted some family land allocated to the two of them. Their elder uncle the deceased thought they were not entitled."

The charge sheet showed that the offence was committed at about 7 p.m. Although Kwekwe claimed to have recognized the assailants she did not tell any of the people who went to the scene including her son and the Assistant Chief that she had recognized the assailants.

The police officer named Edward recorded the circumstances of death in the postmortem report dated 20th August, 1997 thus: -

"THE DECEASED WAS CONFRONTED ON THE WAY BY UNKNOWN CULPRINTS (SIC) WHO BEAT HIM LEAVING HIM UNCONSCIOUS LATER DIED ON ARRIVAL AT KILIFI DISTRICT HOSPITAL."

That contradicts the evidence of Kwekwe and the dying declaration.

The appellant was arrested in about September 1999 while the offence was committed on 18th August 1997 – nearly 2 years later. There was no explanation why the appellant and his brother were not arrested immediately.

The witnesses were in agreement that the deceased suffered serious injuries including mouth and neck injuries and was in critical condition when he was alleged to have named the two attackers. **Kwekwe Katama** said during trial that the voice of the deceased was faint when he spoke. Both Albert and James said in their evidence before Ouko, J. that although deceased was in a bad condition he was able to talk. It is evident that the deceased died a few hours after he allegedly named the two people. Although Assistant Chief Albert testified that the deceased gave the names of two people, senior sergeant Edward Kanyama was consistent that Albert gave him only one name CHIVATSHI CHAI which is not the name of the appellant.

Lastly, there is the problem of the name of the appellant – whether the names mentioned by Kwekwe and the deceased refer to the appellant. The name of the appellant in the committal bundle was given as KAHINDI CHAI DZOMBO. The appellant complained before the subordinate court on 14th September 2001 that the name in the committal bundles did not tally with his name which he gave as DZOMBO CHAI. The record of the committal proceedings show that the police took the finger prints of the appellant to verify his name but the result of finger prints expert was not given to the court. The name of the appellant has been given variously in the trial in the superior court before different Judges as DZOMBO CHAI DZOMBO, KAHINDI WA CHAI, KAHINDI CHAI (MAYONDA); KAHINDI MBOLEA, and KAHINDI DZOMBO CHAI DZOMBO. There was evidence from James that the appellant had three other brothers apart from CHIVATSI CHAI DZOMO who escaped.

The appellant raised the defence of *alibi* very early on 1st October, 2001 during committal proceedings before the subordinate court. He has been consistent through the trial in the superior court that he was in Mombasa when the offence was committed.

The superior court did not subject the evidence to exhaustive examination and merely accepted the evidence on the face value. On our part, having considered all the above circumstances, we have come to the conclusion that the evidence of identification of the appellant by Kwekwe was neither credible nor

watertight. Likewise the evidence of the dying declaration was neither credible nor did it specifically refer to the appellant to the exclusion of any other person. For the foregoing reasons, the conviction of the appellant is unsafe.

In the result, the appeal is allowed, the conviction quashed and the sentence set side. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Mombasa this 19th day of January 2007.

E.M. GITHINJI

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JUDGE OF APPEAL

P.N. WAKI

……………………….

JUDGE OF APPEAL

W.S. DEVERELL

……………………..

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR