REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
MOMBASA
Criminal Appeal 259 of 2006

KENGA FOTO MANGI ……..……. APPELLANT

AND

REPUBLIC …….……..RESPONDENT

***(An appeal from a conviction and sentence of the High Court of Kenya at Malindi (Ouko, J.) dated 28th July, 2003* In H.C.CR. CASE NO. 11 OF 2003)**

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JUDGMENT OF THE COURT

Following his trial and conviction on a charge of murder contrary to ***section 203*** as read with ***section 204*** of the Penal Code ***Kenga Foto Mangi***, the appellant hereinafter, appeals to this Court for the first time against the said conviction and the consequent sentence of death imposed upon him. The appeal being a first one to the Court, the appellant is entitled to expect of us a fresh re-evaluation and reassessment of the evidence upon which he was convicted and sentenced. His trial took place before Ouko, Ag. J as he then was, sitting with assessors at Malindi High Court. The three assessors unanimously passed a verdict of guilty on the charge brought against the appellant. The particulars contained in the Information charging the appellant with murder were that on the 29th day of May, 2002 at Kaembeni village, Mwahera Location of Kilifi District of the Coast Province, the appellant murdered ***Ndunda Mutia Mbiti***, hereinafter, the deceased.

From the recorded evidence, it is clear that the deceased was a lover of ***Chenda Kajeso***, Chenda (P.W.2). That lady was married with three children. Her husband, whose name was given by the appellant as ***Jesu Mandi***, was working and living in Mtwapa away from the homestead where the incident took place. The deceased was a Mkamba working in the village and living in the home of one ***Lewa***. The appellant was a close relative of Chenda's husband – in the words of Chenda herself: -

" I know the accused. He is my brother-in-law. The deceased Ndunda Mbiti was my man-friend ……."

It is pertinent to add that the deceased was living among the Mijikenda community, though he himself was Mkamba by tribe.

The deceased visited Chenda on the evening of 29th May, 2000 and at about 9 p.m they were eating the evening meal when the appellant arrived. Chenda invited the appellant to join in the meal and he did so. According to Chenda, after the meal and after washing his hands, the appellant asked Chenda

"……***about the gentleman sitting next to me. I told him he was called Ndunda. The accused got up, removed a knife from his pocket and followed Ndunda when Ndunda saw the accused had risen he moved away, still in the homestead, but the accused still followed Ndunda and stabbed him. Ndunda fell down. Looking at him I found he had already passed away. Safari Charo came. He is my brother-in-law. Safari went to call the sub-chief of Mwahera sub-location…….***"

According to a neighbour ***Kahonzi Suleiman Charo*** (P.W.5) she heard Chenda screaming at about 11 p.m., pleading that somebody should not be killed. On her way to the place where the screams were coming from, she met ***Safari Charo Mandi*** (P.W.4) and they went to the scene of the screams. They found the deceased had already passed away. The assistant chief was eventually called and when he (***Alfred Safari Deri*** – P.W.7) arrived at the scene, the appellant was still there and handed over to him a knife which obviously had been used to stab the deceased. ***Dr Michael Peter Mwita*** (P.W.1) performed the post-mortem examination on the body of the deceased on 7th June, 2000 and the doctor found an external wound on the third rib on the right hand side. The lung on that side of the body was perforated and there was massive bleeding inside the right side of the chest. There was also damage to the aorta which had been cut into two pieces and which also caused severe bleeding. The Doctor was of the opinion that the immediate cause of death was massive internal bleeding due to the cut aorta and the perforated right lung. The shape of the wound led the Doctor to the conclusion that the wound had been inflicted by the use of a sharp object, namely a knife. So that according to the version of the prosecution as narrated by Chenda who was the only witness at the scene, when the deceased heard the appellant ask Chenda who the deceased was, the deceased started to go away and actually walked out of the house. The appellant produced a knife, followed the deceased and stabbed him to death. That was the basis for the charge of murder.

The version given by the appellant in a sworn statement was, however, radically different from that of Chenda. According to the appellant, while on his way from the mosque, he passed by the home of Chenda's husband whose name, he gave as ***Jesu Mandi*** and whom he said was his (appellant's) relative. At that home he found Chenda having dinner. We quote from the evidence of the appellant: -

" … ***I found his wife Chenda Kajeso having dinner. Under a mango tree there was a person sitting down with the body covered with a sheet. I could not tell whether it was a man or a woman. I joined Chenda to eat dinner – Chicken and Vegetable. When I finished the person who was sitting under a tree asked me why I had eaten. I asked him who he was. A fight ensued between me and him. Chenda did not cry out for help. He wrestled me to the ground. I turned him over and sat on his chest. At this stage he removed a knife. In the course of struggling, while he was holding the knife near his chest, he lamented that it was over. I took the knife from him. Chenda informed that (sic) the person we were fighting with was her lover for the last 15 years. I took the sheet and the knife. I did not know what to do as the chief's camp is far……"***

The appellant in the end added that there was moonlight on the night of the incident, that he did not have a knife and he did not try to prepare for a fight with anyone that night. He also said he did not even know the deceased.

The learned Judge having fully summed-up the case to the assessors, the three of them were unanimous that the appellant was guilty of the charge of murder. In his judgment dated and delivered on the 22nd July, 2004, the learned Judge agreed with the assessors, convicted the appellant and sentenced him to death. He now appeals to the Court on the following six grounds, namely: -

"***1. That the learned trial Judge erred in law and fact. by convicting me, of murder c/section 203 as read with section 204 of the P.C. (Penal Code) without proper finding that no malice was established.***

2. That the learned trial Judge erred in law and fact by failing to find that the death of the deceased came as a result of self-defence when given that it was the deceased who attempted to stab me with the knife.

3. That the learned trial judge erred in law and fact and/or misdirected himself by holding that

he did not understand the relationship between me and P.W.2 while there is sufficient evidence to show that P.W.2 was my brother's wife.

4. That the learned trial Judge erred in law and fact by failing to find that the acts of the deceased abusing me mounted to provocation which deprived me of myself control and forced by circumstances to fight with him.

5. That the learned trial Judge erred in law and fact by failing to consider the evidence of P.W.2 that the deceased was befriending her.

6. That the learned trial Judge erred in law and fact by failing to consider my defence against the evidence of P.W.2"

These are the grounds which Mr. Adam Omar Hamza, learned counsel for the appellant, argued before us and upon which he asked us to allow the appeal by the appellant, and quash the conviction recorded against him. Mr. Monda, the learned State Counsel for the Republic, supported the conviction and asked us to dismiss the appeal.

The grounds, as is apparent from a reading of them, are interconnected and leaving aside for the moment the first ground which deals with malice aforethought, the others raise the issue of self-defence, (ground 2), provocation (grounds 3, & 4) and whether Chenda (P.W.2) was a more credible witness than himself (ground 5).

Mr. Hamza did not really say much on the issue of self-defence. It is true the appellant said in his evidence that he fought with the deceased and that the deceased knocked him down but that he turned the deceased over and sat on his chest when the deceased produced a knife. But the appellant did not, as we understand it and as the learned Judge and the assessors must have understood it, go so far as to say that because the deceased produced a knife and he (appellant) feared the deceased would attack him with the knife, he (appellant) took the knife from the deceased and stabbed the deceased. What is clear from his statement which we have set out elsewhere in the judgment is that the deceased must have stabbed himself using the knife. We once again quote what the appellant said in respect of the stabbing: -

"*……..**In the course of struggling, while he was holding the knife near his chest, he lamented that it was over. I took the knife from him."***

What the appellant was saying was that while the deceased was holding the knife near his (deceased's) chest, the deceased somehow stabbed himself and it was only after the deceased had stabbed himself that the appellant took away the knife from him. In those circumstances, even assuming that they were true, we do not see how the appellant could be said to have stabbed the deceased in self-defence. He himself swore that he never stabbed the deceased.

On the issue of provocation as well, the appellant never said he stabbed the deceased because he had found the deceased in a compromising position with Chenda who was his brother' wife. On this aspect of provocation, Mr. Hamza went on a wild-goose chase and even asked us to apply the "*who is my neighbour principle"* established in the United Kingdom by the case of **DONOGHUE vs. STEVENSON [1932] All E.R. 1**, decided way back in 1932. Mr. Hamza submitted that among the Mijikenda communities, a man finding the wife of his brother with another man in a compromising situation would be entitled to kill that other man and raise the defence of provocation. In fact Mr. Hamza went so far as to say that proposition would apply to all African communities in Kenya and he only limited the application of his proposition to the principle of the good neighbour as defined in the British case already cited, namely "*who, in law, is my neighbour?"* and the answer provided by Lord Atkin to that question, namely …….

"***persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question"***

Apart from the fact that the principle in the case applies to the civil law of negligence, there is absolutely no reason for us to import the principle to the criminal law principle of provocation. ***Section 208 (1)*** of the Penal Code clearly defines the scope of provocation: - That section provides: -

"***The term "provocation" means and includes, except as herein stated, any wrongful act or insult of such a nature as to be likely when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered."***

So there it is and there is no occasion for the Court to import into the matter the principle of a good neighbour as Mr. Hamza asked us to do. If the good neighbour kills the paramour of his sister-in-law and wishes to rely on the defence of provocation, he must be able to show that he was in the immediate care of the woman, or in a conjugal, parental, filial or fraternal relation to the woman. Ouko, J. thought that the defence of provocation was not available to the appellant because the appellant was not the husband. We do not think that holding by the learned Judge was entirely correct and he was certainly wrong in withdrawing it from the assessors on that basis. It is to be noted that the definition of the term "provocation" only "includes" the matters set out in the section; it does not exclude other circumstances and situations which may arise in each particular case.

But on the facts of the case before us, was that defence available to the appellant, in the first place? As we have said in respect of self-defence, the appellant's case was not that he killed the deceased because he was provoked by finding the deceased in a compromising position with his brother's wife (Chenda). What he (appellant) said was that the deceased had carried a knife with him and stabbed himself to death during the struggle between them. Was that contention correct? We must now analyse the respective evidence of Chenda (P.W.2) alongside that of the appellant. As we have seen, Chenda said the deceased was with her in the house and they were taking dinner. The appellant then joined them and after eating the appellant demanded to know who the deceased was. The deceased got up and started to walk away and the appellant produced a knife and followed him. Chenda must have raised an alarm because ***Kahonzi Suleiman Charo*** (P.W.5) heard Chenda screaming and saying that somebody should not be killed. Moreover, there would have been no reason why the deceased would want to attack the appellant. The appellant, on the other hand, would have a reason to attack the deceased because he (deceased) was obviously found in circumstances which would indicate to any reasonable person that the deceased was in an illicit relationship with Chenda. Chenda said it was the appellant who produced the knife and stabbed the deceased. The appellant said it was the deceased who produced the knife and stabbed himself. But the appellant did not say how and why the deceased would stab himself on the chest instead of stabbing the appellant. The stabbing was obviously inflicted with great force going through a rib perforating the lung and severing the aorta. Lying on his back with the appellant sitting on top of him, we cannot comprehend how the deceased could have stabbed himself with such force and why he would not stab the appellant, unless the deceased wanted to commit suicide at that stage. The learned Judge and the assessors agreed with Chenda that it was the appellant who produced the knife and that it was him who stabbed the deceased. Those are findings of facts and though the Court is entitled to re-evaluate and re-assess the recorded evidence, and come to its own conclusions, that requirement does not entitle an appeal court to upset a trial judge's findings on facts unless there be some good reason for doing so. In the circumstances of this case we can find no good reason for disagreeing with the learned trial Judge and the assessors on their finding that it was the appellant who produced a knife, followed the deceased out of the house and stabbed him with the knife, causing his instant death. We agree with the learned trial Judge on this aspect of the matter. Mr. Hamza went so far as to submit that the evidence of Chenda ought not to have been believed because though she was a married woman with three children, yet she was a self-confessed adulteress and by that very fact must be untrustworthy. We would be very reluctant to introduce such a novel principle in our law, namely that a party who confesses to have committed adultery is untrustworthy and his or her evidence must, because of that fact be rejected. If that were the legal position, we suspect that very few men would be found whose evidence would be credible. We reject the proposition.

That conclusion shows that the appellant went to the house of Chenda armed with a knife which he was prepared to use and did use with fatal consequences. Even if the defence of provocation was available to him in the circumstances, one cannot go armed in this way, and after committing the crime claim that one was provoked. The prior arming himself for war must deprive him of the defence of provocation. That being so, even though the learned Judge was wrong in saying that the defence of provocation was not available to the appellant because he was not the husband of Chenda, yet that misdirection did not occasion any injustice to the appellant because had the learned Judge correctly directed himself and the assessors, he would nevertheless have come to the conclusion that the defence was not available to him because he, i.e the appellant, went to the house of Chenda armed with a knife. Add to that the fact that the appellant did not claim that he had killed the deceased because of provocation and it becomes clear that that defence was for rejection and was rightly rejected.

On ground one dealing with malice aforethought, Mr. Hamza stressed the fact that the appellant did not even know the deceased. It was not necessary that the appellant should have known who his victim was. In any case Chenda told him the name of the deceased and the weapon used to inflict the injury, the area where the injury was inflicted and the force with which it was inflicted would show any ordinary reasonable person that the appellant must have intended to kill the deceased or at the very least to occasion to him grievous bodily injury. That is malice aforethought in terms of ***section 206 (a)*** or even ***206 (b)*** of the Penal Code. On our own independent assessment of the recorded word, we are fully satisfied, as were the learned trial Judge and the assessors, that the charge of murder against the appellant was proved beyond any reasonable doubt and that he was rightly convicted of that charge. His appeal against the conviction and sentence must accordingly fail.

Before we leave the appeal, there is some matter which we must point out to trial Judges dealing with capital offences. The judges, as the learned Judge herein did, convict and then straight away pass the sentence of death without complying with the provisions of ***section 324*** of the Criminal Procedure Code. Those provisions give an accused person the right to move a motion in arrest of judgment which in short really means that though there is only one penalty for the offence of murder, namely death, yet an accused person may nevertheless show that he or she ought not to be sentenced to death. A female accused convicted of murder may show, under ***sections 211*** and ***212*** of the Penal Code that she is pregnant and therefore cannot be sentenced to death. A person under the age of eighteen years may also show to the Judge that though convicted of a capital charge, he or she is under the statutory age. We would, accordingly direct trial Judges that they record the conviction separately and then hear the accused person first before passing the death sentence on him or her.

In the circumstances of the case before us, however, there is nothing which would remotely indicate to us that the sentence of death ought not to have been passed on him. We accordingly dismiss his appeal against the conviction and sentence.

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

R.S.C. OMOLO

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JUDGE OF APPEAL

E.O. O'KUBASU

……..

JUDGE OF APPEAL

E.M. GITHINJI

…….

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR