IN THE COURT OF APPEAL OF KENYA AT NYERI

Criminal Appeal 21 of 2006

STEPHEN KILEMI …………………………………......… APPELLANT

AND

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

(Appeal from a conviction and sentence of the High Court of Kenya at Meru (Sitati, J.) dated 25th October, 2005 in H.C.CR.C. NO. 16 OF 1997)

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JUDGMENT OF THE COURT

This is a first and last appeal. The appellant, ***Stephen Kilemi*** together with his brother ***Ernest Kiriamburi*** were arrested and taken to the Senior Resident Magistrate's Court at Maua on an allegation that on *12th day of October, 1996* at Githu Sub-location Tigania East Division of Nyambene District within the Eastern Province jointly murdered ***Geremano M'Amuru***. After that Court had received and considered the committal bundles, as was the procedural requirement in murder cases at that relevant time, that Court found that there was sufficient grounds for committing the two to stand trial in the High Court and it did commit them to the High Court to stand trial for the offence of murder. At the time of committing them to the High Court, the Subordinate Court complied with ***Section 232(4)*** of the ***Criminal Procedure Code*** (now repealed) and the appellant together with his brother (the co-accused) made and signed certain extra judicial statements before the subordinate court. On *27th February, 1998*, apparently after the appellant and his brother had been arraigned in the superior court, his brother passed on, so that only the appellant remained to face the trial in the superior court. The charge that he faced was that on the *12th day of October, 1996* at Githu Sublocation, Thangathe Location in Nyambene District of the Eastern Province, jointly murdered ***Geremano M'Amuru***. He pleaded not guilty and the hearing proceeded with the aid of assessors. After the full hearing, the superior court summarized the evidence to the assessors as well as advising them on the law. The assessors returned a unanimous opinion of guilty as charged against the appellant. The learned judge thereafter delivered judgment on *25th October, 2005* in which, the appellant was found guilty of the offence, convicted and sentenced to death. In convicting the appellant, the superior court (Sitati, J.) stated inter alia as follows:-

"***I therefore find that the accused was at the scene of the murder together with Mbiti, and that he was armed with both a panga and a stick, and that after the deceased had fallen down, the accused continued hitting the deceased with the stick on the ribs.***

In the result, I do concur with the assessors who listened to the hearing with me that there is overwhelming circumstantial evidence to connect the accused to the offence with which he is charged. I therefore have no hesitation in finding the accused guilty of the offence of murder and to convict him accordingly."

The appellant was not satisfied with the conviction and sentence and hence this appeal which was filed by the appellant in person and which was premised on six grounds of appeal. Later when the appellant secured the services of an advocate, the firm of Advocates filed supplementary Grounds of Appeal raising four grounds namely:-

"***1. That the learned trial judge erred in law by finding that there was overwhelming circumstantial evidence as against the appellant.***

2. That the learned trial judge erred in law and in fact in the finding on the issue of common intention.

3. That the learned trial Judge erred in law and in fact in failing to resolve the issue on the time of alleged offence and the conflicting evidence to find that the prosecution had not proved a case to the required standard of proof.

4. That the learned trial Judge erred in law and fact in failing to address the issue of the passage of time since date of offence and the date witnesses adduced evidence more specifically PW2 who was clearly a minor (sic) of tender years at the time of alleged offence and went ahead to rely on such kind of evidence without cautioning herself on the credibility and veracity of the same."

In his submission to us, Mr. Gichimu, while heavily relying on the grounds in the supplementary Memorandum of Appeal, also argued ***ground No. 4*** in the ***Memorandum of Appeal*** filed by the appellant in person. That ground of appeal states:-

"***4. That the trial judge erred in law while further basing my conviction on doubtious (sic) prosecution witnesses evidence of which was tainted with nomerous (sic) here say doubts and descripancies (sic) as per the record reveals clearly (sic)."***

The brief facts giving rise to the appeal before us, as can be deciphered from the record before us are fairly straightforward. The deceased ***Geremano M'Amuru*** was the husband of ***Theresia Murea (PW1)*** to whom we shall refer in this judgment as ***Theresia***. He was also the father of ***Joseph Mwiraria (PW2) (Joseph)*** and one other person known as Gichunge who did not give evidence but was mentioned in the course of the hearing of the case. The appellant was brother to ***Ernest Kiriamburi*** *(referred to in the proceedings as Mbiti)* with whom he was earlier on charged with this offence and who has since died. Joseph was allocated a piece of land next to Mbiti's farm near Githu factory by the deceased. Joseph had planted sukuma wiki on that piece of land. Mbiti uprooted Joseph's sukuma wiki and Joseph in turn went and uprooted Mbiti's soya beans. That was before *12th October, 1996*. On *12th October*, the deceased, Theresia and Joseph left their shamba going home. Joseph was walking ahead of the two. He was almost fifty metres infront of Theresia who was immediately behind him but was also about fifty metres ahead of the deceased who was last. Joseph met Mbiti and the appellant who were both armed with pangas. As the three continued walking home, Theresia heard a loud bang and looking back she saw the deceased had been cut and had fallen down. She said in evidence that the deceased had been cut by Mbiti. At that relevant time, Mbiti was with the appellant. The appellant cut Theresia on the left arm. Both Mbiti and the appellant were standing near the deceased and were armed with pangas and sticks. The appellant hit the deceased with a stick on the ribs. Theresia went home after ascertaining that her husband was dead. Joseph turned and arrived at the scene after the incident but found the appellant and Mbiti still there with their pangas and sticks. The sub area *(whatever that means)* ***M'Nchebere M'Nabea (PW5)*** heard screams and went to where screams were coming from. He met one, Gichunge, another son of the deceased at the scene. Gichunge told him the deceased had been killed and led him to the scene near Mbitis house. On arrival at the scene, M'Nabea saw the body of the deceased. In the meantime, Theresia had returned to the scene of crime and M'Nabea found her, and a daughter of the deceased at the scene. The two were screaming. Theresia told M'Nabea that the deceased had been killed by Mbiti and the appellant. M'Nabea told Theresia to go home and he together with Gichunge went to report to ***George Mithili Mathilai (PW3)*** who was then the Assistant Chief of Githu Sub-location where the incident took place. The same Mathilai states that at 8:00 p.m. on the same day *12th October, 1996*, the appellant and Mbiti went to his house. Mbiti told him, *(Mathilai)* that he (Mbiti) had killed the deceased. Mbiti had

blood stains and had a panga. Mathilai told them to go home but next day Mbiti surrendered himself at Mikinduri Police Station, where he was received by ***Inspector Musembi Kaloki (PW4)*** the then OCS at that Police Station. IP Kaloki visited the scene on that day *13th October, 1996*. He found the body of the deceased. He carried out investigations on the spot and interviewed Theresia and Joseph, together with the appellant and Mbiti. He took possession of the panga that was surrendered to him by Mbiti as the murder weapon and drew a rough sketch plan of the area. I.P. Kaloki then arrested Mbiti and the appellant and took the body of the deceased to Meru District Hospital Mortuary. Dr. Mutune, then, of Meru District Hospital carried out the post mortem of the deceased and filled the post mortem form which was produced in Court by ***Dr. Issac Mwangi Macharia (PW6).*** The report showed that the cause of the deceased's death was due to severe head injury. It showed specifically that the deceased had cuts on the head and bruises on the back. The appellants were thereafter taken to Court. As we have stated, Mbiti died before the actual trial in the superior court started. The appellant pleaded not guilty to the charge. At his trial, he gave a sworn statement in his defence. His defence was that on the material day at about 7:30 p.m., he heard noises while he was at home. The screams continued for 10 minutes. He left the house and as he was walking to his other house, he heard his brother's wife warning his brother not to go to the deceased's house. He shouted his brother's name and saw his brother ***(Kiriamburi or Mbiti)*** who had a cut on the head. He asked his brother why he *(brother)* was fighting ***Geremano.*** At that time, Geremano was not in Kiriamburi's compound. Kiriamburi, his brother, informed him that the deceased's son had uprooted his (Mbiti's) soya beans. He then advised his brother to go and report the matter to the Assistant Chief. He did not see Theresia and/or Joseph that night. He then escorted his brother to the Assistant Chief. The Assistant Chief told them to return home. Next morning he did not see his brother, but he (appellant) remained at home. He was arrested on *13th October, 1996* and he explained to the Inspector of Police what he knew on the matter but the Inspector rejected his version. He thus denied any involvement in the fight that ended in the deceased's death.

The above is a summary of the evidence that was before the trial Court. Before us, the learned Counsel of the appellant submitted that the learned trial judge erred in finding that there was any evidence to prove common intention between the appellant and his brother; that there was conflicting evidence as to the time the alleged incident took place and this was not resolved by the trial Court; that the trial Court erred in finding that there was overwhelming circumstantial evidence that proved the case and that the evidence before the Court did not prove the case within the standard required in law. Mr. Orinda, the learned Principal State Counsel, on the other hand maintained that there were two eye witnesses to the offence; that as to the question of conflict of evidence on the time when the incident occurred, it is a question of who was believed by the Court who saw the witnesses and their demeanour; that the appellant actively took part in the commission of the offence and as such the question of common intention was not an issue. Further, he contended that as the appellant and his brother armed themselves and waited for the deceased, the intention to commit the offence was proved. On delay to complete the case and the evidence of Joseph, Mr. Orinda submitted that the age of a witness is important at the time he gives evidence and not at the time the offence takes place so that Joseph, who gave evidence when he was *20 years old* had his evidence properly received as at that time he was no longer a young person whose evidence requires caution before it could be relied on.

This is a first appeal, as we have stated above. That being the case, we are duty bound to revisit the evidence that was adduced in the trial court a fresh, analyse it and re-evaluate it but always bearing in mind that the trial Court had the advantage of hearing the witnesses, and seeing their demenaour, and thus we must give allowance for the same - See the case of ***OKENO VS. REPUBLIC*** ***[1972] EA 32***.

The appellant's defence is that he was not involved in what he calls the fight that led to the deceased's death. According to him, it was his brother, who is now deceased, who fought the deceased, and the fight took place at night ***(about 7:30 p.m.)*** at the home of his brother. His brother Mbiti, in a statement he gave to the Magistrate's court before they were committed to the High Court for trial also stated in extra judicial statement to which we have alluded hereinabove that he (Mbiti) is the one who cut the deceased in self defence at his home and the appellant was not involved in the melee at all. On the other hand, Theresia says the appellant and his brother attacked the deceased at 3:00 p.m. while they were walking home from their shamba and whereas she did not see the first blow and who inflicted it, as the attack took place on the deceased who was fifty metres behind her, she however turned on hearing loud noise and on

rushing to where her husband was, she saw Mbiti and the appellant near the deceased. The appellant had a panga and a stick whereas Mbiti had a panga. The deceased had fallen down. At this point she said:-

"***Mbiti was with his brother called Kilemi. Kiremi (sic) cut me on the left hand. This is the scar. At the time I saw Mbiti Kiremi was also standing there where my husband lay. The two were armed with pangas and sticks.***

On seeing what had happened to my husband (sic). I demanded but could not help them because he had been cut. I went back to where my husband lay and found he was already dead. The child followed me to the scene. At the scene, Kilemi cut my hand. Kilemi hit my deceased husband with a stick on the ribs. After I was cut and screamed, the sub area called Ncheberi came to the area."

In cross-examination, she insisted and stated:-

"***I still say it is Mbiti who cut my husband but it is Kilemi who cut my hand."***

Joseph in his evidence said that while walking ahead of his parents, he met Mbiti and the appellant and the two had pangas. Later when he heard screams from his mother and he looked back, he saw the same two people at the scene and saw that one had a panga while the other had a stick.

In our view, there is enough evidence to show that the statement of the appellant and that of his brother that it was Mbiti who killed the deceased on his own and the appellant was not in any way involved could not be true. Inspector Kaloki, who first heard the version of the appellant and his brother and later heard the version of Theresia and Joseph believed the latter version, the trial court likewise believed the latter version and we too find the evidence of Theresia and Joseph cogent. Their evidence has some support in the Post Mortem report where the injuries found on the deceased were cut on the head and bruises on the back. We believe it. Section 21 of the Penal Code states:-

"***21. 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."***

In this case, the evidence we accept is that Joseph met the appellant and his brother having pangas and immediately thereafter deceased was admittedly attacked by Mbiti in the presence of the appellant who later hit the deceased with a stick on the ribs and cut Theresia on the hand. He (the appellant) cannot say he was not jointly with Mbiti in the commission of the offence that led to the deceased's death.

The next matter we need to look into is the conflict as to the time the offence was committed. This is only important as to the effect of the alleged contradiction on the entire case. But is there contradiction on time? Theresia and Joseph, both state that the attack took place at 3:00 p.m. and they buttress that by saying they were all coming from the shamba. The appellant says that he heard screams while at his house at 7:30 p.m. and that is when he went to Mbiti's house and heard Mbitis wife warning Mbiti not to go to the deceased's home. M'Nabea, the sub area says he remembered *12th October, 1996* at 7:00 a.m. is when he heard screams and he went to answer the screams. The impression one gets is that whereas Theresia and Joseph said the offence took place at 3:00 p.m., the appellant, M'Nabea and Mbiti stated the offence, took place at about 7:30 p.m. We think the evidence attributed to M'Nabea that he heard screams at 7:00 a.m. is clearly a typographical error. We will ignore it and accept that the time he heard screams was 7:00 p.m. and not 7:00 a.m. However, when we critically analyse the evidence of Theresia, a different impression is created. Theresia says that after her husband had been cut she went home to check on the other children who were at home. She went home leaving the deceased at the scene. Later, she went back to the scene and stayed there until morning. Mathilai said Mbiti went to his house at 8:00 p.m. to report the incident. If the incident had taken place at 7:30 p.m. we doubt whether a report to the assistant chief would have been made at 8:00 p.m. only thirty minutes later. Certainly, M'Nabea would not have received the report at 7:00 p.m. thirty minutes before the incident took place. Even more important when Theresia's evidence of returning to the scene later is read together with evidence of

M'Nebea , the question of time becomes even clearer. M'Nabea says:-

"***I was at home when I heard screams and I went to answer the screams. I then proceeded to where the screams were coming from and on the way I met one young man called Gichunge son of the deceased. He told me his father had been killed. He led me to the scene which was near Mbiti's home and on arrival, I saw body of the deceased. At the scene, I found the deceased's wife one Murea, and daughter of the deceased. The two were screaming, Githunge told me the deceased had been killed by Mbiti and Kilemi."***

That episode M'Nabea is talking about must have been long after 3:00 p.m. and that Theresia's daughter was also there together with deceased's other son Githunge, the time must have been sometime after 3:00 p.m. and the screams M'Nabea heard were as he says, the screams of Theresia and her daughter and may not have been the first screams when the incident took place. We are of the view that when all is considered, the alleged discrepancy of time when the incident took place is so small that it is inconsequential. In any case, even if the offence had occurred at night, the totality of the evidence still points to the appellant and his brother, the late Mbiti as the only culprits and none other. There was no suggestion that the appellant was wrongly identified.

That leaves the question of whether or not on the evidence before the trial court, the appellant was properly convicted of the offence of murder. That the deceased died as a result of the wounds inflicted on him particularly by the panga is not in dispute. The post mortem report to which we have referred and the evidence of Dr. Issac Mwangi Macharia to which we have referred hereinbefore are clear on that aspect. That evidence is that the deceased died as a result of severe injury to intercerebral heamorrage. Theresia was walking infront of the deceased albeit only fifty metres ahead. Joseph was about 100 metres ahead of the deceased. Theresia heard a loud noise and on turning she saw her husband had fallen down. The appellant and Mbiti were there holding pangas and a stick. She saw the appellant hit the deceased on the ribs and hit her. Later, Mbiti reported to the assistant chief that he (Mbiti) had killed the deceased. In court Mbiti said he did it alone and appellant was not involved. It is true, none saw either Mbiti or the appellant or both of them inflict the fatal blow that culminated to the deceased's death, but under the circumstances that are clear from the evidence, the only inference that one could come to is that the appellant and his brother were the aggressors and none else. In the case of ***KARIUKI KARANJA VS. REPUBLIC [1986] KLR 190***, this Court relying on the case of ***REX VS. KIPKERING ARAP KOSKE, 16 EACA 135*** held as follows:-

"***In order for circumstantial evidence to sustain a conviction, it must point irresistibly to the accused and in order to justify the inference of guilt on such evidence, the inculpatory facts must be incompatible with innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The burden of proving facts justifying the drawing of that inference is on the prosecution."***

As we have demonstrated above, the evidence that was adduced showed, not only that the appellant was at the scene even if nobody saw him cut the appellant, but also that he was, immediately Theresia heard the sound of cutting of the deceased, seen by her together with Mbiti who readily agreed he cut the deceased. The appellant immediately thereafter turned when the deceased was still on the ground, hit the deceased with a stick and cut Theresia on the hand. Theresia showed the scar to the trial court. We cannot come to a different conclusion from that the superior court entertained and that is that the circumstantial evidence, in our view, pointed to none other than the appellant and his brother as the perpetrators of the act that ended in the deceased's death.

Mr. Gichimu also raised the question of another person having been mentioned who was not called as a witness. Theresia stated in the evidence that when her husband was being killed, one Joseph M'Mbiru was at the scene and asked the appellant and his brother why they were killing the deceased like a goat. That Joseph M'Mbiru was not called as a witness. Mr. Gichimu invited us to accept that the prosecution did not call him on fear that perhaps if he was called his evidence would have been against the prosecution case. In the case of ***BUKENYA & OTHERS VS. UGANDA, [1972] EA 549***, it was held inter alia:-

"***(ii)* The prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent.**

(iii) The court has the right, and duty to call witnesses whose evidence appears essential to the just decision of the case.

(iv) Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution."

In Kenya, the case of ***NGUKU VS. REPUBLIC* [1985] KLR 412** accepted the above principles.

In this case, was the evidence called "***barely adequate"*** to warrant our inference that the evidence of Joseph M'Mbiru would have tended to be adverse to the prosecution? We don't think so. The evidence as to who inflicted the fatal blow was not challenged. The evidence as to who were there with the one inflicting the fatal blow was given by two witnesses who were present about the time of the incident. Under these circumstances, we see no ground for suggesting that M'Mbiru's evidence would have been adverse to the prosecution. We say no more on that submission. It has no merit.

We were invited to consider the delay in hearing the case in the superior court and its effect on the evidence of Joseph who was then a young man of ***12 years*** in ***1996*** when the incident took place, but gave evidence on *29th November, 2004* when he was *20 years old*. We agree with Mr. Orinda, that the age of a witness is essential at the time he gives evidence and not at the time the incident upon which is giving evidence occurred. The age is required for assessment of the credibility of a witness and hence the need to take precaution when dealing with a witness of tender years. That he is of tender years when the offence takes place does not on its own mean he cannot remember the events when he is older.

Lastly, Mr. Orinda, in his submissions, suggested that perhaps we could consider whether the charge could be reduced to a lesser charge of manslaughter in view of the allegation by the appellant, which is accepted by the prosecution that there was grudge between Joseph and Mbiti on grounds that Joseph alleged that Mbiti uprooted his sukuma wiki and he also uprooted Mbiti's soya beans. We have considered that aspect. In our view, much as we were not told when that happened, it was not on the date of the incident and hence we cannot see any provocation upon Mbiti on that score. The evidence given by Joseph is that he met the appellant and his brother carrying pangas and a stick and soon thereafter the two attacked the deceased. That is clearly waylaying the deceased and killing him. That in our view is premeditated action and cannot be said to have been done on the spur of the moment upon provocation. We agree with the learned Judge that that formed the motive that made the two brothers plan to severely injure the deceased ending into the deceased's instant death. We cannot see any grounds for reducing the offence to that of manslaughter.

We have considered the entire evidence that was before the trial Court as we ought to do. In our view, the totality of the evidence leaves us with only one conclusion and that is that the trial court's decision was based on sound reasoning backed by evidence on record and that being our view, we have come to the same conclusion as the superior court. This appeal cannot stand. It is dismissed. Judgment accordingly.

Dated and delivered at NYERI this 18th day of May, 2007.

P.K. TUNOI

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR