IN THE COURT OF APPEAL OF AT NYERI

Criminal Appeal 121 of 2006

MORRIS MUNGATHIA ……..…….…. APPELLANT

AND

REPUBLIC ……..…… RESPONDENT

***(Appeal from a Conviction and Sentence of the High Court of Kenya at Meru (Sitati, J.) dated 30th March, 2006* in H.C.CR.C. NO. 173 OF 2003)**

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JUDGMENT OF THE COURT

On *30th March, 2006*, ***Morris Mungathia Mugambi***, the appellant, was convicted and sentenced to death on a charge of murder contrary to ***section 203*** as read with ***section 204*** of the Penal Code by the superior court (Sitati, J.) He was aggrieved and hence this appeal. In his home made Memorandum of Appeal he has raised five grounds of appeal, but at the hearing of the appeal, his counsel, *James Nderi*, with leave of the Court, put in a supplementary Memorandum of appeal, out of time, in substitution therefor. In that supplementary memorandum of appeal, he has raised three grounds of appeal, namely;

"***(1) The Honourable trial Judge erred in fact and in law in convicting the appellant when there was no evidence of his capacity to stand trial.***

(2) She erred in fact and law in failing to appreciate the role of the assessors in a murder trial.

(3) She erred in law and in fact in misdirecting herself on the evidence of the defence and shifting the burden of proof to the accused."

In the first ground of appeal, *Mr. Nderi* submitted that in any criminal case, it is important for the Court to satisfy itself on particularly the mental capacity of the accused to stand trial, a fact the trial Judge overlooked and thus rendered the appellant's trial defective. He cited ***section 12*** of the Penal Code as providing the basis for his submission. ***Section 12***, aforesaid, as is material, provides:-

"***12. A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission …….……"***

The appellant was not relying on this section or any disease of the mind as a defence to the charge of murder which he faced. As we shall point out later, the fact of his conscious act of cutting his victim was admitted. He raised the defence of self-defence. He was not saying he did not know what he was doing. We, however, think that in an appropriate case, this not being one, it is important and prudent to exclude by evidence the possibility of absence of capacity for the act or omission giving rise to the charge an

accused stands charged. Regarding the appeal before us, we do not consider that the failure by the trial court to satisfy itself as to the capacity of the appellant to stand trial caused him any discernible prejudice.

Before dealing with the remaining two grounds of appeal, it is important to set out the background facts.

The deceased was attacked by the appellant on *21st June, 2003,* at Kabuitu trading Centre in Meru North District, in Eastern Province, at about 9 a.m. The appellant used a panga and cut the deceased about three times. First, across the right cheek severing the right side upper jaw and three incisor teeth. The second cut caused multiple compound fractures on the frontal side measuring about 15 cm long. The third cut was on the occipital area measuring 8 cm long. There were also lacerations in the thoracic and stomach areas. As a result of these injuries, the deceased bled to death.

The prosecution called ***Silas Maore***, ***Martin Mukaria***, ***Julia Mukiri*** and ***Naftaly Kibaya*** as eye witnesses to the attack. The substance of their testimony is that the appellant was seated by the roadside at Kabuitu Village, armed with a panga. He saw ***Onesmus Thuranira***, the deceased, approaching in the company of two or three other people. He rose from where was seated and first attacked *Silas Maore* and cut him on the head with the panga. Thereafter, he turned to the deceased and cut him several times as we earlier stated. He fell down. While he was on the ground, the appellant inflicted more injuries. Those with the deceased, screamed and many people answered the screams. They pursued the appellant who on realizing that many people were approaching took to his heels. There is evidence on record that those who were injured were taken to Maua Methodist Hospital for treatment. The appellant was taken along with them. He had suffered a cut wound on the head but there is no clear evidence from the prosecution witnesses how he had suffered the injury. The appellant was later charged with the offence of murder.

The appellant's trial was with the aid of assessors. Before the trial commenced, the record of appeal shows that the Deputy Registrar of the trial court was directed to summon ***five (5) potential individuals*** from whom ***three*** would be selected as assessors. On the day of selection only three people were present. ***Section 297*** of the Criminal Procedure Code provides:-

"***297. When a trial is to be held with the aid of assessors, the Court shall select three from the list of those summoned to serve as assessors at the sessions."***

The trial court caused the three persons who were present to serve as assessors for the trial of the appellant. In his submissions before us on the appellant's second ground of appeal, Mr. Nderi contended that the court did not comply with the provisions of ***Section 297*** above, as, in his view, there was no selection. The court accepted those present, and its action did not amount to a selection. We, however, note that the appellant was represented by counsel, Mrs. Ntarangwi. She did not object to any of the three people serving as an assessor. That being the position, we are unable to appreciate Mr. Nderi's point. Each assessor is selected on his own right. ***Section 269*** of the ***Criminal Procedure Code***, makes provision as to summoning of people to serve as assessors. The Deputy Registrar of the High Court writes a letter to a Magistrate requesting him to summon as many persons "***as seem to the Judge who is to preside at the Sessions to be needed ……..…."***. The trial Judge had indicated that five people would be needed. There is no suggestion that letters were not written to five people. Nor is there provision that unless all those summoned attend, the trial should not commence. We are satisfied that the court correctly followed the process of selecting assessors, and nothing turns on the appellant's complaint.

There is a second limb to the appellant's complaint regarding the role of assessors. After the case was summed up to the assessors, they retired to consider it. When they were invited to give their opinion, one of them stood up and declared "***We have unanimously found the accused guilty as charged."*** Mr. Nderi took issue with this, arguing that the law required each assessor to state his opinion in the case. ***Section 322(1)*** of the ***Criminal Procedure Code***, provides that:-

"***322(1) When, in a case tried with assessors, the case on both sides is closed, the judge may sum up the evidence for the prosecution and the defence and shall then require each of the assessors to state his opinion orally, and shall record that opinion."***

There is a line of authorities on this issue, to wit ***MWANGI V. REPUBLIC* [1983] KLR 522, *FRANCIS JUMA S/O MUSUNGU V. R.* [1958] EA. 193,** among others. All these authorities emphasize the need for each assessor to independently give his or her opinion on the case.

We are of the view that in the circumstances of this case, which is in all fours, with the case of ***FRANCIS JUMA S/O MUSUNGU V. R.***, supra, the proper course the trial Judge should have adopted was to ask the other assessor to confirm the correctness of what had been said, and whether he wished to add anything more.

We have anxiously considered this issue. We are satisfied that the failure to ask each assessor to give his opinion independently was an irregularity but which, on the facts and circumstances of this case, is curable under the provisions of ***section 382*** of the Criminal Procedure Code.

The last ground of appeal raises fundamental issues. In his defence, the appellant admitted he cut the deceased and inflicted fatal injuries on him, but contended that he acted in self defence. The law on self-defence was succinctly stated in the Privy Council case of ***CHAN KAU V. R (2) (1955) W.L.R. 192.*** as follows:-

"***In cases where the evidence discloses a possible defence of self defence the onus remains throughout upon the prosecution to establish that the accused is guilty of the crime of murder and the onus is never upon the accused to establish this defence apart from that of insanity."***

It would appear to us that the duty of an accused person facing a murder charge who relies on the defence of self-defence is to lay before the Court facts upon which the defence is based. The whole purpose of doing so is to enable the court and the prosecution to understand the basis of such a defence. He assumes no responsibility of establishing that defence. The prosecution, however, has the onus of showing that the appellant was not acting in self-defence and that there was time and opportunity before the fatal blow to retreat. ***(See MANZI MENGI V. R [1964] EA. 289).***

In the appeal before us, the record of appeal shows that the appellant made a sworn statement in his defence. He stated that on *21st June, 2003*, at 9 a.m. while outside his house at Kabuitu Market, he met one, ***Mukiri***, a step-mother of the deceased. She inquired whether ***Karambu*** was at home. Karambu was his wife and a cousin of the deceased. He responded that Karambu was inside the house, which was not true because by his own admission, he had chased her away. While still outside his house the appellant saw ***Silas Maore***, who was Karambu's brother, and ***Martin Mukaria*** coming towards him. According to the appellant, both men told him that they had been looking for him as they disapproved of his relationship with Karambu. They were joined by one, ***Onesmus Thuranira***, the deceased, and one, ***Kibaya***. These men set on him and the deceased cut him on the head with a panga. As he tried to cut the appellant a second time, the panga hit against a wall and fell off his hands. The appellant picked it up and used it to cut the deceased. He used the same panga to cut Silas Maore, who like the deceased had cut him, but on the hand. He then took to his heels. The appellant further stated that his attempt to escape did not succeed as he fell down as a result of dizziness. He was later taken to the hospital along with others who had been injured and was treated. He denied he was attacked by members of the public as he attempted to escape.

The appellant concluded his testimony by saying that he attacked the deceased because he realized he was in danger, and that "***Right from the beginning I have always been ready to plead to lesser charge of manslaughter that is still my plea and my defence today."***

The appellant was cross-examined at length but in his response he maintained that he had been attacked by several people who had threatened to kill him. He denied he was armed with a panga or any other weapon. As to why he did not retreat when he was attacked, the appellant's answer was:-

"***I did not run away, though I was sensing danger. I could not run away because I (sic) turned to them they would kill me."***

How did the learned Judge handle the appellant's defence? In her judgment, Sitati, J. rendered herself thus:-

"***I have considered the accused's contention that it was PW1 who attacked the accused first and that this being the case court should infer absence of malice aforethought on his part. From the evidence on record, the accused has not laid a basis for the defence of self-defence. All the evidence on record points to the fact that it was the accused who attacked PW1 first. The evidence also shows that it was the accused who later slashed the deceased so badly that the deceased had no chance of survival. The accused has urged the Court to find that he was not attacked by members of the public and secondly that he was justified in cutting the deceased with a panga. Again, there is no evidence by the defence to dislodge the prosecution's case that the accused's attack on the deceased was unprovoked, uncalled for and extremely savage."***

The appellant suffered some injuries which were serious. He was medically examined, his medical report was marked for identification, but was not tendered in evidence. We are therefore unaware of the extent of his injuries. The prosecution did not adduce evidence to explain who in particular inflicted those injuries and the extent thereof. ***Naftaly Kibaya*** testified that members of the public inflicted the injuries on the appellant but he did not identify the particular person who did it. As we stated earlier, the appellant denied he was cut by members of the public. Considering that those the appellant alleged had attacked him were relatives of his wife, the prosecution should have but did not call evidence to dislodge the appellant's version of the attack and to exclude the possibility of an attack on him. It is our judgment that the trial Judge misdirected herself when she held that the appellant should have but did not call evidence to dislodge the prosecution's case that he attacked the deceased unprovoked. As we stated earlier, an accused does not assume the burden of proving his defence. It is the duty of the prosecution to show by evidence that the accused was not acting in self-defence and to exclude the possibility of any evidence which is likely to create a doubt regarding his culpability. It was with justification that Mr. Orinda, Principal State Counsel, did not support the appellant's conviction for the offence of murder.

We also note that the learned trial Judge did not fully analyze the appellant's defence. Instead she made a generalized statement that the appellant had strategically positioned himself to attack his victim. There was no evidence of this, and it was clearly a misdirection for the learned Judge to come to such a conclusion without evidence.

On the basis of what we have stated above, we find that the appellant was improperly convicted of murder on the basis of the evidence that was before the Court. The appellant, however, cut the deceased several times. He used more force than was necessary to repulse what he said was an unjustified attack on him. Clearly, this was a clear case of manslaughter and in our view, had the learned trial Judge fully evaluated the appellant's defence, she would not have convicted the appellant of murder but of manslaughter contrary to ***section 202*** as read with ***section 205*** of the Penal Code. In the result, we quash the appellant's conviction for murder contrary to ***section 203*** as read with ***section 204*** of the Penal Code and substitute therefor a conviction for the offence of manslaughter contrary to ***section 202*** as read with ***section 205*** of the Penal Code.

Having come to the above conclusion, what remains is sentence. The appellant's counsel before the superior court was asked to say something in mitigation before sentence was meted out but he said he had nothing to say. In the circumstances, what we go by in deciding on sentence are the facts and circumstances of the case. The appellant cut the deceased several times even when he had fallen down. The attack was vicious, and an appropriate sentence in the circumstances is an imprisonment term of ***15 years***. Accordingly, we order the appellant to serve an imprisonment term of ***15 years*** to run from ***30th March, 2006***. Order accordingly.

Dated and delivered at Nyeri this 11th day of May, 2007.

P.K. TUNOI

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR