REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT MOMBASA

Criminal Appeal 281 of 2006

1. KITSAO KAINGU KAZEE

2. JUMA KARISA MWABATI……..…….... APPELLANTS

AND

REPUBLIC ……....……. RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya Malindi (Ouko, J) dated 17th January, 2006 In H.C. Cr. Case No. 4 of 2005)

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JUDGMENT OF THE COURT

On 10th March, 2005 the appellants herein, Kitsao Kaingu Kazee (as the 2nd accused) and Juma Karisa Mwabati (as the 1st accused) were arraigned before the High Court of Kenya at Malindi on a charge of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence were that the two appellants jointly murdered Chengo Mwambire Msaji on 22nd October, 2004 at ADC Kisiwani Farm Village within Malindi District of the Coast Province. Each appellant pleaded not guilty to the charge and their trial commenced on 30th May, 2005 before Ouko J. who sat with three assessors.

The summary of the evidence adduced before the superior court was as follows:

On 22nd October, 2004 at about 11.00 p.m. Dama Kaluwa (PW 2) and her co-wife Kanzi Kaluwa (PW 3) were asleep when they were awakened by some commotion from a nearby palm wine den. Both came out and saw the two appellants and one Kazungu Wa Kazee beating up the deceased person while other revellers in the den cheered them on. The two women (PW 2 and PW 3) screamed for assistance and the appellants ran back to the club. Kanzi (PW 3) went to report the incident to the village elder Kazungu Wazizi (PW 4). In the meantime Dama (PW 2) saw the two appellants remove the body from the scene to unknown place. The following day Kazungu (PW 4) mobilized the villagers to search for the deceased. Benson Mwakale Mwalimo (PW 5) was among those who recovered the deceased person's body in the river. As a result of the discovery of the body in the river the police were alerted and moved the body to the mortuary. On 29th November, 2004 Dr. Arnold Obenjo (PW 1) performed postmortem examination on the body of the deceased. According to Dr. Obenjo the body had wounds on both eyes, and the left eye was smaller than the right eye. In concluding his evidence in chief Dr. Obenjo testified:

"**There were no other injuries. It was my opinion that death was secondary to the injuries on the**

head – the eyes. There was fracture on the bone next to the left eye which was reduced in size."

The appellants were arrested and charged.

At the close of the prosecution case the trial court put the two appellants on their defence. Each appellant elected to defend himself by way of an unsworn statement.

In his unsworn statement, Kitsao Kaingu Kazee (1st appellant herein and 2nd accused during the trial) stated that on 1st November, 2004 two police officers from the Chief's office arrested him and that on the fifth day he was transferred to Malindi Police Station where he was charged with the offence of murder. It was his defence that he was not involved in the deceased person's murder. He maintained that the deceased person was not known to him.

In his unsworn statement, Juma Karisa Mwabati (2nd appellant herein and 1st accused during the trial) denied participating in the crime. It was his defence that Kanzi Kaluwa (PW 3) who was expecting a baby with his uncle implicated him in this matter after failing to obtain some money from him to procure an abortion. He was arrested in November, 2004 in connection with this case.

After summing up to the assessors by the learned Judge, each assessor returned a verdict of guilty in respect of each appellant.

The learned Judge duly considered the evidence adduced both by the prosecution and the defence as well as the submissions by counsel appearing for both sides and came to the conclusion that the two appellants were guilty as charged and he proceeded to sentence each of them to death as by the law provided. In concluding his judgment, the learned Judge stated:-

"**In the present case, both eye witnesses maintained that the 2nd accused person kicked the deceased in his private parts before the latter collapsed and died.**

But according to the witnesses, before coming out to witness the last blow they had heard the deceased being beaten repeatedly as a crowd cheered up. From this evidence as well as the doctor's evidence, I am persuaded that the head injuries from which the deceased died were inflicted by the two accused persons. They, acting, again, in concert, removed the body from the scene to unknown place. However following a search by the villagers the body was found discarded in the river.

The manner in which the two accused persons executed their common intention was a clear manifestation of their intention to cause death or do grievous bodily harm to the deceased. They beat him repeatedly concentrating in the eye region.

…….. (sic) the 1st accused in the light of overwhelming evidence of the eye witnesses placing him at the scene of the crime.

The 2nd accused person's defence that there was bad blood between him and Kanzi (PW 3) is equally not convincing. He too was clearly identified, indeed recognised by the two eye witnesses as he beat up the deceased. For these reasons, I find the two accused persons guilty of murder contrary to section 203 of the Penal Code and convict them accordingly. They are each sentenced to death in accordance with the law."

It is from the foregoing that the appellants now come to this Court by way of first appeal and through their advocate Mrs. Jane Moraa Adogo, a supplementary Memorandum of Appeal was filed setting out the following grounds of appeal:-

"**1. The learned trial Judge erred in law and in fact in convicting the appellants for murder when there was no evidence as to the cause of death of the deceased and in any way connected to the appellants if at all.**

2. The learned trial judge erred in law and in fact in convicting the appellants for murder when the prosecution respondents (sic) never established mensrea (sic) and Actus Reus on the part of the respondents or at all.

3. The learned trial judge failed to sufficiently warn himself of the inadequate, improper and riddled with error, evidence of recognition and identification of the appellants, and when such evidence was not corroborated, proceeded to solely rely on it to convict and subsequently sentence the appellants as charged.

4. The learned trial judge misdirected the assessors in summing up of the evidence and allowed himself to be clouded in his judgment as a whole thereby failing to regard the weaknesses in the prosecution case which failed to place the accused persons in the drinking pub, and in the crowd of people that may have participated in the killing of the deceased.

5. That the whole prosecution case against the appellants was fatally weak as there was no evidence direct, or indirect, pointing to the guilt of the appellants on the Actus Reus, and the mensrea (sic) and in ignoring the defence of the appellants thereby wrongly convicting and sentencing the appellants for murder, when he should have acquitted the appellants."

When this appeal came up for hearing before us on 23rd July, 2007 Mrs. Jane Moraa Adogo appeared for both appellants while Mr. V. S. Monda (State Counsel) appeared for the State. In her submissions, Mrs. Adogo argued that PW 2 and PW 3 who were supposed to be the eye witnesses were not clear in their evidence whether the person who was being beaten died. It was her contention that there could have been other causes of death since the cause of death was not clearly established as it was not proved that it was the appellants who caused the death of the deceased. Mrs. Adogo completed her submission by maintaining that a charge of murder or manslaughter could not be sustained. She thought that perhaps what was proved was the offence of simple assault.

Mr. Monda on his part conceded that the evidence on record could not sustain a conviction on a charge of murder but manslaughter. Mr. Monda complained that Dr. Obenjo who conducted the postmortem examination did not do a good job as there was no internal examination of the body. He therefore conceded that there was no clear evidence as to the cause of death. As regards the evidence of identification, Mr. Monda submitted that this was a case of recognition rather than identification as the two appellants were known to the two eye witnesses; and there was moonlight at the material time. Mr. Monda finally asked us to substitute the conviction of murder with manslaughter.

This being a first appeal the appellants are entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to have this Court's own decision on the evidence – see **Okeno v. R [1972] E.A** and **MWANGI V R [2004] 2 KLR 28**.

At the commencement of this judgment we gave the summary of the evidence adduced before the trial court. The incident took place at about 11.00 p.m. and the two eyewitnesses were Dama Kaluwa (PW 2) and her co-wife Kanzi Kaluwa (PW 3). These two ladies testified that they were awakened by a commotion from a nearby club and that on coming out they saw the two appellants and one Kazungu wa Kazee beating somebody. In her evidence in chief Dama, (PW 2) stated, *inter alia*:-

"**On 22.20.2004 at about 11 p.m. I was at home sleeping when we were woken up by some noise. I came out and saw the 2 accused persons and Kazungu wa Kazee. The 2 accused persons were kicking somebody. It was my first time to see the person who was being beaten. He had come for a drink. I came out with Kanze Kalume (sic) - my co-wife. We screamed - calling for help. People responded. Charo and Muraguna, the owner of the club came. The accused persons ran back to the club. As we screamed, the deceased rose and started to run but was kicked on his private part by 2nd accused. He fell down and died. We called the village elder - Kazungu Wazizi. When he arrived at the scene, I saw the 2nd accused person running away carrying the body of the deceased into the bush towards the river.**

The following morning the village elder took us to the river (Galana) to identify the body. It was the body of the person who was being beaten. He had come early in the day to drink. It was at night but I was able to see the incident because I was very close and I knew the 2 accused persons. There was also moonlight."

The second eye witness Kanzi Kaluwa (PW 3) in her evidence in chief stated, *inter alia*:-

"**On 22.10.2004 at about 11 p.m. I was asleep when I heard noise at the club saying "beat him, beat him". I came out. There is a path through my home to the club. When I came out I saw the 2 accused persons and Kazungu Kazee. When we came out I saw the 2nd accused kick the deceased on his private parts. The deceased groaned and died. I rushed to the village elder's home and reported. When I returned with the village elder (Kazungu) at the scene we did not find the body. PW 2 told us that the accused persons took it away. The following day we went with the village elder to River Galana (Sabaki) where we identified the body. There was moonlight. It was bright. I saw the three assault the deceased. The police collected the body."**

The learned Judge considered the evidence of the two eye witnesses and believed them. In the cause of his judgment the learned Judge expressed himself thus:-

"**The incident took place at 11 p.m. The deceased was a new comer to the village and was not known to the two eye witnesses, Dama and Kanzi. But the two were categorical that they saw the two accused persons beating the deceased. The two accused persons were known to the eye witnesses prior to the date of the incident. They were local boys in the village and Kanzi had known them when they were about 6 years of age before the incident, while Dama had known them from birth.**

According to Kanzi there was bright moonlight. When they raised alarm and when the accused persons realized that the deceased had died they removed the body from the scene. The two accused persons were properly recognized by the two prosecution witnesses."

On our own re-evaluation of the evidence on record we are in agreement with the learned Judge that the two appellants were properly recognized at the scene where they (and one Kazungu wa Kazee) were being cheered as they kicked a person. This person they were kicking was found dead the following day. This was a case of recognition rather than identification and as it has been observed severally, recognition is more satisfactory, more assuring and more reliable than identification of a stranger – see **Anjononi v. Republic [1980] K.L.R. 59**.

Having been satisfied that the two appellants were recognised beating the deceased, there is the more difficult question as to whether they could be convicted of murder as charged in the superior court. The learned State Counsel very properly conceded that the cause of the deceased's death was not clearly established hence the charge of murder was not proved. He asked us to substitute the conviction for murder with manslaughter. But even on a charge of manslaughter, it is upon the prosecution to prove that it was the accused who unlawfully caused the death of the deceased. In the present case the cause of death was not clearly established. Dr. Obenjo was of little assistance to the prosecution as his postmortem examination was conducted rather superficially. The evidence on record merely shows that the appellants were seen kicking the deceased who then "collapsed and died". The body was then removed from the scene by the appellants to unknown place. When a search was conducted by the villagers the body was found discarded in the river.

Having considered the evidence, the submissions by both counsel appearing, we are of the view that the offence that the appellants could be convicted of was assault since it was not proved to the required standard that it was the appellants who, by kicking the deceased, caused the deceased's death.

In view of the foregoing, we allow this appeal by setting aside the conviction on the charge of murder and we also set aside the sentence of death passed on each appellant. We however substitute the conviction with that of assault contrary to **section 251** of the Penal Code and sentence each appellant to

four (4) years imprisonment, the sentence to run from the date the appellants were convicted by the superior court i.e. 17th January, 2006.

Dated and delivered at Mombasa this 27th day of July, 2007.

R.S.C. OMOLO

..……..……

JUDGE OF APPEAL

E.O. O'KUBASU

…….**..……**

JUDGE OF APPEAL

P.N. WAKI

…….**..…….**

JUDGE OF APPEAL

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

DEPUTY REGISTRAR