REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA PEAL AT MOMBASA

Criminal Appeal 257 of 2006

CHANGAWA KALAMA NDORO *alias* CHANGAWA KAKONI ……..…APPELLANT

AND

REPUBLIC …….....…….RESPONDENT

***(An appeal from the conviction and sentence of the High Court of Kenya Malindi (Ouko, J.) dated 7th October, 2005* in H.C.CR.C. NO. 25 OF 1998)**

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JUDGMENT OF THE COURT

This case has an unfortunate and chequered history. On two occasions the trial proceeded for sometime and it had to start de novo, but without any fault on the part of either the prosecution or defence. The respective Judges who commenced the trial of the case were transferred and in exercise of their statutory rights the parties requested the court to start the trial de novo. As a result of this the trial was not concluded until after the expiry of well over eight years. The charges were murder contrary to section 203 as read with section 204 of the Penal Code. Particulars of the first count were: -

"Changawa Kalama Ndoro on the night of 16th and 17th September, 1997 at Ramada Village in Adu Location within Malindi District of the Coast Province, jointly with others not before the court murdered Mae Kadenge Ngowa."

There were two other similar counts but with ***Shaka Nzaro Kututu***, and ***Zena Masha Mwangundu*** as the victims.

The trial was with the aid of assessors. The prosecution called 9 witnesses and the defence, the appellant and two others. The main issue in the case was identification. The prosecution case was that ***Mae Kadenge Ngowa*** (the first deceased), was polygamous with ***Mwenda Mae*** (PW5) and ***Shaka*** (2nd deceased) as his wives. Those wives had separate accommodation. The deceased was in Shaka's house and her grandchild. On the night of 16th and 17th September, 1997, a group of people invaded the deceased's home and headed straight to Shaka's house. The time was 1 a.m., and PW5 testified that there was bright moonlight. PW5 was asleep and was awakened by the screams of Shaka's grandchild. She came out of her hut which was close by. She moved closer to Shaka's hut. Standing at Shaka's entrance was a man. She called Shaka by name but she did not respond. The man standing by the door ordered her to return. She observed that he was armed with a panga. It was her evidence that she observed the man and recognized him as this appellant. She said that she was about three metres away from him and with the help of the bright moonlight she was able to recognize him. He was a man she knew well as the first deceased's sister was his wife. He was a person she had known for many years, and was sure he was

the person she saw standing at the entrance into Shaka's hut.

PW5 was sure the man was armed with a panga because when he ordered her to return she hesitated after which the man raised the panga threatening to cut her with it. That scared her as a result of which she retreated, went back to her hut, picked her children who were therein and escaped with them into a nearby bush.

PW5 later informed several people what she observed. Among those she informed were ***Masha Mkamba*** (PW3), ***Fredrick Kahindi Djeka*** (PW4) who was the area chief and Chief Inspector ***Leonard Kiplomo*** (PW1). It was on the basis of her information that the appellant was arrested and charged as hereinbefore stated.

The first deceased, the 2nd and ***Zena Mwagundu*** (3rd deceased) had cut wounds. The first deceased on the head, hands and body, the second on the stomach and intestines were exposed and also on the hands and neck, the third deceased on the head and right elbow. They were all dead with the first deceased's body lying on the floor near the door, the 2nd likewise lying on the floor but not near the door, and the third lying on a bed.

The motive for the killing was unknown, but PW4 testified that it had been alleged that the 1st deceased was suspected to have been engaged in witchcraft.

On 17th September, 1997, ***Dr. Nyabanda***, a medical officer of health, performed a postmortem examination of all the three bodies and prepared postmortem reports which were tendered in evidence on his behalf by ***Dr. Mathias Anderson Ezekiel Kai*** (PW10). It was contended on behalf of the appellant that PW10 was not competent to produce those reports as he neither performed the postmortem examinations nor was he familiar with Dr Nyabanda's signature. Besides contrary to accepted practice, the postmortem instead of being performed either in a hospital or mortuary, was performed at a police station. Mr. Okoth Odera, counsel for the appellant, expressed the view that the failure to call Dr. Nyabanda was out of the fear that if he testified his evidence would be unfavourable to the prosecution case. Nothing turns on these complaints as the witness testified that he had worked with Dr. Nyabanda and knew his signature. Besides performing a postmortem at any place cannot per se be said to be prejudicial.

The appellant made a sworn statement in his defence, stating that he became aware of the death of the three deceased persons through ***Kadzo Ngowa***, a niece of his wife, ***Kadzo Mwairnga*** (DW3) but they did not go to the scene until 18th September, 1997 when the three deceased persons were buried. The appellant was arrested while attending the burial ceremony. DW3 like her husband, the appellant, testified that on the material night of the killings the appellant did not leave his house which was some distance away from the deceased persons' home. ***Safari Changawa*** (DW2), the appellant's son testified to the same effect.

In his summing up to the assessors the trial Judge, W. Ouko, J. frequently referred to the killing of the three deceased persons as murder, implying that he had made up his mind before judgment that murders had been committed. That approach was disapproved in **Kioko v. R (1982- 88) 1 KAR 157**, in which, like in the present case, the trial Judge had repeatedly used the word "murder" in is summing up. The Court there said: -

"**With respect it was a misdirection each time the learned Judge advised the assessors, and himself also, that the offence of murder had been committed. The repeated Judge's pre-empting in this respect was unfortunate both as regards the assessors and himself. It was not to be assumed that murder had been committed. The important issue to be decided at the trial was whether the appellant was guilty of the murder…or some other offence, or perhaps not at all. The foregoing passage from the judgment of the learned Judge indicates that he had already decided in his mind that the appellant was guilty of murder while he had not yet expressly come to that conclusion...It was an unfortunate approach which was strongly suggestive of the burden being shifted onto the**

appellant to establish his innocence. In murder or manslaughter the burden never shifts from the prosecution."

Mr. Odera in reliance of that authority submitted that the approach of the trial Judge prejudiced the appellant and he should therefore be acquitted of the offences he was convicted of not only on that ground, but also because of insufficiency of evidence. Clearly the trial Judge misdirected himself in his approach and we adopt the reasoning of Court in ***Kioko vs. R***. (supra).

There is no doubt that the three killings were at night by more than one person. PW5 testified that apart from the person she saw standing at the entrance into Shaka's hut, there were others inside who were the ones who, presumably, cut the three deceased persons. It is axiomatic that at night time circumstances favouring a correct identification or recognition are difficult unless it can be shown that there was ample light to facilitate a correct identification or recognition.

PW5 testified that there was bright moonlight and that she was about three metres away from the person she saw at Shaka's doorstep. That distance is short and with ample moonlight it is possible to recognize a person one knows well. PW5 further testified that she had known the appellant for many years, even before she got married. The trial Judge believed her. His wife and her husband were sister and brother. The evidence, prima facie, appears to be straightforward and clear. But in view of what we state herebelow doubts linger in our minds as to the guilt of the appellant.

The appellant and his wife behaved strangely when they received information about the death of the three individuals herein. They got the information on 17th September, 1997 but they don't seem to have been shocked. They waited until the next day and went just to attend the burial. DW3's brother and sister-in-law were among the dead.

Another factor we would like to consider is the fact that the appellant alleged there was bad blood between him and PW5 arising from an alleged adulterous association between PW5 and one ***Katana Wachome***. The latter had allegedly been ordered presumably by clan elders, to pay adultery compensation to the first deceased which he paid, and the appellant was one of the people the 1st deceased sent to collect the compensation. PW5, according to the appellant, was not happy with this and hence the bad blood. The trial Judge considered this issue and ruled that there was no bad blood. It was possible there was no bad blood and it was possible there was. The prosecution did not adduce evidence to show what the real motive for the killing was. We appreciate that ***section 9(3)*** of the Penal Code provides that motive is not an essential element as regards criminal responsibility. However, motive as part of the *res gestae* is essential for a full appreciation of the circumstances leading to the act or omission complained of.

The last factor we would like to consider is the fact that the assessors returned a finding of not guilty, but the learned trial Judge did not at all explain why he differed with them. It is a fundamental principle that where, as here the trial Judge differs with the assessors on the question of the accused's guilt, he is obliged to assign reasons, which the learned Judge failed to do. This is a factor which fundamentally goes to the root of the conviction.

In all the circumstances of this case, we entertain a doubt as to the appellant's guilt, the benefit of which doubt we give to the appellant with the result that we allow the appellant's appeal, quash his conviction for the three counts of murder, and set aside the sentence of death which was imposed on him. He shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

Dated and delivered at Mombasa this 20th day of July, 2007.

S.E.O. BOSIRE

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

W.S. DEVERELL

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR