



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Civil Appeal 118 of 2006

NGUNDI NDALI MUTEMIAPPELLANT

AND

REPUBLICRESPONDENT

(An appeal from a conviction and sentence of the High Court of Kenya

Machakos (Osiemo, J.) dated 16th March, 1994

in

H.C.CR.C. NO. 14 OF 1993)

JUDGMENT OF THE COURT

The appellant herein, *NGUNDI NDALI MUTEMI* was tried before Osiemo J. sitting with assessors (as the law provided then) on an Information charging him with murder contrary to *section 203* as read with *section 204* of the Penal Code. The particulars contained in the Information were that on the 27th day of February, 1993 at about 5.00 p.m. at Ndalani village, Mwingi Location in Kitui District of the Eastern Province the appellant murdered *KABULU MUNYOKI NDALI*.

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

On the material day (27th February, 1993) the deceased *Kabulu Munyoki Ndali* and *Kimanzi Munyoki* (PW1) went to the shamba to harvest beans and after harvesting the beans Kimanzi (PW1) left the deceased burning charcoal as Kimanzi went back home. On the way home Kimanzi met the appellant who asked Kimanzi the whereabouts of the deceased. Kimanzi informed the appellant that the deceased was still at the shamba. The appellant then proceeded towards the shamba where the deceased had been left. That same afternoon *Syombua Mwinzi* (PW2) was across the river from where she could see the appellant. This witness saw the appellant take a spade and start digging behind a tree. Then the appellant collected something which he buried where he had been digging. After burying whatever it was the appellant moved away. Mwinzi (PW2) became suspicious of what she had witnessed the appellant doing and so she reported to *Ngumo Sammy* (PW3) who then accompanied her to the scene which was along the Kivou river. PW3 took a spade and when PW2 pointed out the scene PW3 used the spade to uncover what had been buried which turned out to be the body of the deceased.

In his evidence **Robert Munywoki Ndali** (PW4) testified that the appellant had spent the night at his place and that when the appellant left on the morning of 27th February, 1993 he (the appellant) did not tell him where he was going. But later that day Ndali (PW4) was informed that his son (the deceased) had been killed. The matter was reported to the police and as a result the police came to the scene when it was confirmed that the deceased was the son of Ndali (PW4). The appellant who was a member of the family disappeared from home and was arrested later to be charged with the offence of murder.

When put to his defence the appellant chose to give evidence on oath. In his evidence the appellant stated that he was not at home on the material day as he had gone to his mother's parents. He went on to testify that he was arrested five days after the death of the deceased.

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

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 appellant was guilty as charged and he proceeded to sentence the appellant to death as by the law provided. In concluding his judgment the learned Judge stated: -

“I have evaluated the evidence adduced by the prosecution as well as that of the defence and I find that the circumstantial evidence irresistibly points at the accused as the one who murdered the deceased Ngundi Ndali Mutemi.

All the three assessors returned a unanimous verdict of guilty and I have no reason to differ with them.

The prosecution has proved its case beyond any reasonable doubt that it was the accused who murdered the deceased and I have no hesitation in finding you Ngundi Ndali Mutemi guilty of murder contrary to section 203 as read with section 204 of the Penal Code and I convict you accordingly.

The only sentence provided for murder is death. I sentence you Ngundi Ndali Mutemi to death.”

It is from the foregoing that the appellant now comes to this Court by way of first appeal. The appellant filed a memorandum of appeal in person, citing four grounds of appeal which grounds were adopted by his counsel Mr. W.O. Nyende who appeared during the hearing of the appeal on 13th November, 2007. In his submissions Mr. Nyende raised two main issues: -

- i) identification.
- ii) defence of alibi by the appellant.

It was Mr. Nyende's contention that the superior court relied on the evidence of identification by PW2 who said that she saw the appellant burying an object and that she was on the other side of the river when she allegedly saw the appellant. Mr. Nyende reminded us that from where the witness was to where the appellant was it was a distance of about 150 metres.

Secondly, Mr. Nyende faulted the learned Judge for having failed to consider the defence of *alibi* that was raised by the appellant. Finally, Mr. Nyende submitted that there was no eye witness to the act of killing.

Mr. J. Kaigai the learned Senior State Counsel supported both the conviction and sentence of the appellant. He contended that the evidence was overwhelming in that the evidence of PW2 was clear and consistent as she saw the appellant digging and burying what turned out to be the deceased.

As regards the defence of *alibi* Mr. Kaigai submitted that that defence was displaced by the evidence of PW2. He went on to submit that circumstantial evidence was sufficient to sustain the appellant's

conviction. He therefore asked us to dismiss this appeal.

This being a first appeal the appellant is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination and to have this Court's own decision on the evidence - see **OKENO v. R.** [1972] E.A 32 and **MWANGI v R** [2000] 2 KLR 28.

At the commencement of this judgment we gave a summary of the evidence adduced before the trial court. The incident is said to have taken place between 3.00 p.m. and 5.00 p.m. on 27th February, 1993. Although Mr. Nyende submitted that there was no eye-witness this may not be correct. The evidence of **Syombua Mwinzi** (PW2) is crucial in this case. This is the lady who saw what was happening across the river. In her evidence-in-chief Mwinzi (PW2) stated, *inter alia*: -

“I come from Kivou. I recall on 27th February, 1993 at around 3 p.m. I was at Kivou River. I was loading some foodstuffs on my donkeys, while there I saw the accused Ngundi digging under the tree. Ngundi is the accused. I had known the accused before. I was about 150 metres. The accused was across the river. The accused was also near the riverbank across the river. I saw him digging the ground under the tree. He was using a spade. I watched what he was doing. I continued loading my donkey. Later when I observed I saw him carrying something heavy and placed it at the hole he had dug. I saw him coke (sic) the hole where he had placed something. The accused had also a small jerricane, which he had to pour water on the hole. Accused was alone and he was not talking anything. Thereafter accused left the scene. I went and called one Kithae Mutemi and informed him about what I had seen accused do and I asked him to check what was inside that hole that accused had dug. Mutemi went and called his daughter-in-law who came with a spade. He removed the soil and I saw a human ear. We were two of us. We came to know that what accused had buried there was a human being. We went away and informed one Kithomi. Another man who was grazing his animals was called and he came to witness. The matter was reported to the police. Kithomi went to Mwingi to inform the father of the deceased. The grandmother of the deceased was left to guard the scene. I later learned that the body in the grave was that of Kabulu. I saw when the police removed the body and took photos. At that time I did not see the accused.”

There was then the evidence of **Ngumo Sammy** (PW3) whose evidence was as follows: -

“I come from Kivou. I recall on 27th February, 1993 at about 5 p.m. I was at my home. While at home I saw one Syombua. She came to my home. She reported that she had seen accused bury something near the riverbank. I took a spade and proceeded to the scene, Kivou River. I went with her to show me where she had seen accused bury something. There was another member of the village. P.W.2 showed me the scene. I used the spade to recover the soil and witnessed an ear of a human being. I saw the face of a human being. I recognised it was the face of the deceased Kabulu Ndali. I had known him before. We went back home and informed other village as well and the family of the deceased.”

On our own re-evaluation of the evidence on record we are satisfied that the appellant was properly recognized by Mwinzi (PW2) who saw him from across the river. This is not a case of identification but recognition. Indeed, the sequence of events was such that the appellant was clearly placed at the scene of crime where he was seen by Mwinzi. There was the evidence of **Kimanzi Munyoki Ndali** (PW1), a young boy, who was harvesting beans with the deceased. This young boy met the appellant on the material day and he is the one who told the appellant that the deceased was in the shamba burning charcoal. The appellant then walked towards the direction where the deceased was. And from the other side of the river Mwinzi (PW2) was able to see what the appellant was doing - *“digging the ground under the tree Carrying something heavy and placed it at the hole he had dug....”* When Mwinzi (PW2) alerted the other members of the family it was discovered that it was the body of the deceased which was buried in the same place that the appellant had been seen “digging and burying.” There can be no other conclusion from the foregoing than that it was the appellant that killed the deceased and buried him at the place where the body of the deceased was found.

From the foregoing the defence of *alibi* raised by the appellant was completely displaced. Hence the learned Judge cannot be faulted in his conclusions.

We would reiterate that the appellant's conviction was based on evidence of recognition as the witness knew the appellant well. The incident took place in broad day light. In **ANJONONI & OTHERS v. R** [1980] KLR 59 at p. 60 this Court said:

“This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We drew attention to the distinction between recognition and identification in Siro Ole Giteya v The Republic (unreported).

We consider that in the present case the recognition of the appellants by Wanyoni and Joice to whom they were previously well known personally, the first appellant also being related to them as their son-in-law, was made both possible and satisfactory in the two brightly-lit torches which two of the appellants kept flashing about in Wanyoni's bedroom in such a manner that the possibility of any mistake was minimal. In addition, immediately after the robbers left, Wanyoni reported their names to the owner of the farm where he worked. He also later on the same night gave the names of the three appellants to the police as the robbers who had robbed him.

We are satisfied that there was no mistake as to identity of the three appellants and they were properly found guilty of the offence with which they were charged in count 1.”

Having considered the evidence and the submissions by both counsel appearing, we are of the view that the appellant was convicted on very sound evidence. We therefore find no merit in this appeal and order that the same be and is hereby dismissed in its entirety.

Dated and delivered at NAIROBI this 14th day of December, 2007.

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

W.S. DEVERELL

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR