



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU

CRIMINAL APPEAL 200 OF 2005

BONFACE OWINO OLOO APPELLANT

AND

REPUBLICRESPONDENT

***(Appeal from a conviction and sentence of the High Court of Kenya at Busia (Mr. Sergon) dated
7th July, 2005***

in

H.C.CR.C. NO. 2 OF 2002)

JUDGMENT OF THE COURT

Bonface Owino Oloo, the appellant herein, was charged with murder contrary to **section 203** as read with **section 204** of the Penal Code. The particulars of the offence were that, on the 13th day of January, 2001 at Bumala village, Bumala sub-location in Busia District within Western Province, the appellant jointly with others not before court murdered Sylvester Opondo Kwena.

The trial of the appellant commenced on 2nd June, 2004 before Sergon J. Fredrick Odongo Sikenga (PW1) testified that on 13th January, 2001 he was at his home taking supper when he heard screams coming from the home of Kwena, the deceased. As a result of the screams **Sikenga** ran to the house of the deceased where he found the deceased lying on the ground with stab wounds. There were people in that house who were crying. As **Sikenga** was going back to his house he saw somebody in a white shirt standing on the footpath. **Sikenga** flashed his torch and tried to greet the man who was standing on the footpath but the man, did not respond. **Sikenga** recognised the man as the appellant. **Sikenga** asked the appellant why he was standing where he was and yet his (appellant's) brother had been stabbed. **Sikenga** then went to his house.

The evidence of Joseph Kwena (PW2) was to the effect that he was a neighbour of the deceased and that on the material day, (13th January, 2001) at about 8.00 p.m. he heard the screams of Caroline Auma (PW3) the wife of the deceased. Kwena rushed to the scene and found the deceased having fallen down, with injury on his stomach. More people came to the scene, the incident was reported to the Administration Police Camp and the body of the deceased eventually taken to Busia District Hospital. It was the evidence of Kwena that on that fateful day he had seen the appellant in the company of the deceased at 6.00 p.m. Kwena concluded his evidence by stating that when he went to the scene he did not see the appellant but later on the appellant came to the scene.

In her evidence Caroline Auma Opondo (PW3) testified that the deceased was her husband, who was at home on 13th January, 2001 and that at about 7.00 p.m. the deceased went out without saying where he was going. Within a short time Caroline heard the deceased screaming and saying “**Father I am dead**”. Caroline rushed out to go and check what was happening only to find the deceased lying on the ground with his intestines protruding from the right hand side. The deceased never talked while Caroline started screaming. As a result many people came to the scene and the matter was reported to the police who came and removed the body from the scene.

As a result of this incident Pc Charles Odhiambo (PW4) proceeded to the scene where he found the body of the deceased lying on the ground. It was Pc Odhiambo who received the information about the appellant and as a result the appellant was arrested the next day. The police proceeded to the house of the appellant where a white shirt (Exhibit 1) was recovered under the mattress/bed. This shirt had blood stain the sample of which was taken to the Government Chemist for examination. Later Pc Odhiambo received the report from the Government Chemist. In his evidence in chief Pc Odhiambo stated:-

“I later received a report from the Government Chemist dated 24th April, 2001. The report was prepared by J. K. Munguti. The blood samples of the deceased was found to be of group A. The blood samples of the suspect was found to be of group O. The shirt recovered from the accused’s house had blood stains of group A. This matches with the blood samples of the deceased. I wish to produce the exhibit memos as Exhibit No. 3A and the report as Exhibit No. 3B.”

At the close of the prosecution case the appellant was put to his defence. He opted to make unsworn statement in which he stated that on 13th January, 2001 he was at home and that during the night he heard people screaming and proceeded to the direction where the screams were coming from. He reached the house of the deceased and found him lying dead with stab wounds. The appellant was asked to go and inform the father of the deceased and as a result he proceeded to do so. From there he went back to his home. The appellant emphatically stated that he never met the deceased on the material day. He however, said that he remained at the home of the deceased until the police came to remove the body and that when the police requested him to record a statement he refused to do so which act infuriated the police leading to his arrest. It was the appellant’s stand that he was not involved in the death of the deceased.

After final submissions by the appellant’s counsel (Mr. Ashioya) the learned Judge made a detailed summing up to the assessors and in the end each of the three assessors returned a finding of guilty. The learned Judge reserved his judgment which he eventually delivered on the 7th July, 2005.

In the course of his judgment the learned Judge said:-

“The prosecution tendered the evidence of Fredrick Odongo Sikenga (PW1) and Joseph Kwena (PW2) to show that the accused had the opportunity to commit the crime. PW2 Joseph Kwena gave evidence to the effect that he saw the accused with the deceased at 6.00 p.m. on 13th January, 2001. This witness also saw him come late to the scene after other people had come. PW1, Fredrick Odongo Sikenga said he saw the accused near the scene when he flashed his torch while going back from the scene to his house. The evidence of these two crucial witnesses were (sic) not shaken on intense cross-examination mounted by Mr. Ashioya for the accused. I observed the demeanour of each of these witnesses and I found them to be straight forward witnesses. I believed their testimonies. I again agree with the assessors that the accused was at the scene of crime and obviously had the opportunity to meet the deceased. I do not believe his assertion that he was with his parents at Sighulu village. The evidence tendered by the prosecution over this issue is more credible and believable when considered vis-à-vis the evidence of the recovery of the blood stained shirt”.

The learned Judge then proceeded to consider the evidence to the effect that the blood stained shirt which was produced as an exhibit was recovered either under the mattress of the appellant or just under the bed, and the appellant’s initial explanation was to the effect that the blood on the shirt was as a result of a dog biting him. The appellant then changed the story and said that the blood got on his shirt while he was

loading the body of the deceased on the police vehicle.

On the issue of the blood stained shirt the learned Judge in his judgment said:-

“I am convinced that in the circumstances of this case that the accused had his shirt stained with blood from the deceased while stabbing him. In this regard, I agree with the opinion of the assessors that the blood found on the accused’s shirt was the blood shed by the deceased. The chain of events in this case points to the conclusion that it is only the accused who murdered the deceased and nobody else. The prosecution has therefore proved beyond reasonable doubt that the accused was involved in the murder of the deceased.”

The learned Judge then concluded his judgment by stating:-

“The upshot therefore is that I find Boniface Owino Oloo guilty of murder as charged. I sentence him to suffer death in the manner authorized by law.”

Being aggrieved by the foregoing the appellant, through his counsel, Mr. Onsongo filed this appeal citing the following six grounds of appeal.

- “1. The evidence of identification and or recognition was insufficient in the circumstances of the case.***
- 2. The trial court failed to appreciate that the evidence of blood on the Appellant’s clothing could have been as a result of the presence of the Appellant at the point where the deceased died.***
- 3. The evidence relating to the blood and its grouping is not conclusive.***
- 4. The prosecution failed to call crucial competent and compellable witnesses such as Mr. J. K. Munguti of the Government Chemist.***
- 5. The superior court treated the Appellant’s statement in defence with bias and a skewed mind.***
- 6. The trial court shifted the burden of proof by stating that:-***

“..... He gave unsworn statement without calling any witnesses “(pg 7 of the judgment)

“.... The accused gave unsworn statement in his defence without calling any independent witnesses though he had indicated that he was to summon witnesses to buttress his defence. “(pg 2 of the judgment)”

When this appeal came up for hearing before us on 19th June, 2006, Mr. Onsongo started his submission by arguing the first ground of appeal. He was of the view that the superior court shifted the burden of proof by asking the appellant to prove his innocence when it appeared to require the appellant to call independent witnesses to support his alibi.

As regards the first ground of appeal Mr. Onsongo submitted that as the incident occurred at night the conditions favouring a correct identification were absent and that there was no inquiry into how far the witnesses were from the person they alleged was wearing a white shirt. To support his arguments Mr. Onsongo relied on this Court’s decisions in ***Cleophas Otieno Wamunga v. Republic – Criminal Appeal No. 20 of 1989*** (unreported) and ***Anzaya v. Republic*** [1986] KLR 236.

Mr. Onsongo argued the rest of the grounds together and concentrated on the issue of blood stains on the shirt recovered from the house of the appellant. It was Mr. Onsongo’s contention that Mr. Munguti the Government Analyst ought to have been called to give evidence and since Mr. Munguti was not called to testify, it was Mr. Onsongo’s submission that the evidence of blood stains was not conclusive. Mr. Onsongo further submitted that the explanation given by the appellant in his defence was reasonable in

the circumstances of the case. Finally Mr. Onsongo argued that the deceased was able to talk before he died and yet he never mentioned who stabbed him.

On his part Mr. Musau the learned Senior Principal State Counsel supported the appellant's conviction on the ground that the prosecution case was based on circumstantial evidence in that the appellant was seen at the scene of murder by two witnesses who knew him and that a blood stained shirt was found hidden under his bed. This shirt had blood stains of blood group A which was the same blood group of the deceased. As regards the Analyst's report Mr. Musau submitted that the report as regards blood groups was produced pursuant to **section 77** of the Evidence Act. Mr. Musau pointed out that the appellant had given two versions on how the blood stains got on his shirt. Finally Mr. Musau concluded his submission by telling us that the appellant was convicted on very sound evidence.

This being a first appeal it is our duty to re-evaluate the evidence and make our own conclusions. In the now well known case of ***Okeno v. R* [1972] E.A. 32** at page 36 this Court's predecessor stated:-

"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v. R.*, [1957] E.A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v. R.*, [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v. Sunday Post*, [1958] E.A. 424."

It is pursuant to the foregoing that we set out the evidence of the prosecution witnesses and what the appellant stated in his evidence in the superior court and finally the findings and conclusions reached by the learned trial Judge. What emerges from the evidence in the superior court is that the deceased met his death due to stab wounds in his lower abdomen. This incident took place on the evening of 13th January, 2001. The sequence of events is such that the deceased left his house at about 7.00 p.m. without telling his wife Caroline (PW3) where he was going. A few minutes later the deceased was heard screaming saying **"Father I am dead"**. He uttered no more words and he succumbed to the stab wounds and died. Many people came to the scene who included his wife Caroline (PW3), Sikenga (PW1) Kwena (PW2) and Pc Odhiambo (PW4). It was the evidence of **Sikenga** that he saw the appellant on a footpath and that the appellant refused to answer **Sikenga's** greetings. On his part Kwena testified that he had seen the appellant in the company of the deceased that evening at about 6.00 p.m. The police officer who came to the scene and conducted investigations was Pc Odhiambo (PW4) and it was his evidence that he recovered a blood stained white shirt under the bed of the appellant. That shirt was sent to Government Analyst in Nairobi whose report was produced as an exhibit. In the report signed by one Mr. J. K. Munguti, Government Analyst we find the following:-

"SUMMARY AND OPINION:- The blood stains on the shirt of the suspect (item A) matched in group the blood sample of the deceased. These blood stains could have come from the deceased after injury."

Mr. Onsongo attacked the production of the Analyst's report by a police officer but the answer to that argument, as correctly submitted by Mr. Musau, was that the report was produced pursuant to **section 77(1)** of the Evidence Act (Cap. 80 Laws of Kenya) which provides:-

"In criminal proceedings any document purporting to be report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analyst may be used in evidence."

It is to be observed that the appellant was represented by counsel (Mr. Ashioya) during his trial in the superior court and there is no indication that there was any objection to the production of the analyst's report or a request that the Government Analyst be present and personally produce his report.

Having considered the evidence adduced by the prosecution and the defence by the appellant it is our conclusion that the appellant's conviction was based on circumstantial evidence which formed a sequence of events starting with the appellant being seen in the company of the deceased shortly before the incident, then shortly after and being found in possession of a shirt which had blood stains of the blood group of the deceased. It is to be noted that the appellant was of blood group O while the deceased was of blood group A. The appellant's explanation was first that the blood on his shirt was as a result of being bitten by a dog. That could not be true because if, indeed, the blood on his shirt was as a result of a dog bite, then this blood ought to have been of the appellant's blood group which was blood group O. The appellant then changed his story and said that the blood stains must have been from the deceased as the appellant assisted in loading the body of the deceased on the police vehicle. On this issue of blood stains the learned Judge who had the advantage of seeing and hearing the witnesses stated as follows in the course of his judgment: -

"I am convinced that in the circumstances of this case that the accused had his shirt stained with blood from the deceased while stabbing him. In this regard I agree with the opinion of the assessors that the blood found in the accused's shirt was the blood shed by the deceased."

As regards identification of the appellant by **Sikenga** all we can say is that although the incident occurred at night we observe that **Sikenga** had a torch which he flashed and recognised the appellant standing along the footpath. This was evidence of recognition rather than identification since the witness (PW1) knew the appellant well. As it was said in **Anjononi v. R [1980] Kenya L.R. 89**, recognition of assailants is more satisfactory, more assuring and more reliable than identification of a stranger. So that the scenario we get is that of the appellant being seen in the company of the deceased at about 6.00 p.m. and at about 8.00 p.m. the deceased is heard screaming and soon after he dies of stab wounds. The appellant is seen within the vicinity but his behaviour is rather suspicious as he would not talk to anybody. To complete the picture the appellant's house is searched the following day and under his bed blood stained shirt is found. The blood stain on the shirt was examined by Government Analyst and the blood stains on the appellant's shirt were found to be of the same blood group as that of the deceased. The appellant did not offer any reasonable and acceptable explanation as to how a blood sample similar to that of the deceased came to be found on his shirt which was hidden under his bed. A rebuttable presumption that the appellant was the murderer arises. Taking all these circumstances into account and examining them carefully they lead to only one irresistible conclusion that it was the appellant who killed the deceased.

In **R v. Taylor Weaver and Donovan (1928) 21 Cr. App. R 20** the principle as regards the application of circumstantial evidence was enunciated in these words: -

"Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial."

The requirements for conviction in a case depended wholly on circumstantial evidence were set out in **R v. Kipkering arap Koske & Another [1949] 16 EACA 135** in which it was stated: -

".....in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt."

The above has been followed and applied in many cases the most recent one which comes to our mind being **Sawe v. Republic [2003] KLR 364 at page 375**.

We have carefully considered the evidence adduced during the trial of the appellant in the superior court and having re-evaluated the same have come to the conclusion that the appellant was convicted upon very sound evidence based on his suspicious behaviour at the scene of murder, being found in possession of a shirt which had blood stains which matched that of the deceased and taking the sequence of events into account we see no reason to fault the findings of the learned trial Judge.

In view of the foregoing we find no merit in this appeal and we order that the same be and is hereby dismissed in its entirety.

Dated and delivered at Kisumu this 23rd day of June, 2006.

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.O. O'KUBASU

.....

JUDGE OF APPEAL

W.S. DEVERELL

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR