



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT MOMBASA
Criminal Appeal 80 of 2006

RODGERS KYANGAAPPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Mombasa (Maraga J.) dated 6th March, 2006

in

H.C.CR.C. NO.14 OF 2003)

JUDGMENT OF THE COURT

This is an appeal by **Rodgers Kyanga** from the judgment of D.K Maraga J. dated 23rd February 2006 in which he was convicted of the offence of murder contrary to **Section 203** as read with **Section 204** of the Penal Code. The victim of the alleged murder was **Isilovo Kilonzo Mbunga** (*the deceased*).

The deceased died of stab wounds inflicted on her between 9.45 pm and 10 pm on the evening of the 2nd March 2003.

There were only two witnesses who were in the vicinity of the scene of the crime. These two were **Mweni Peter Gwiko**, a 19 year old woman, (hereinafter "**Mweni**") and **Joseph Musyoka Munyaka** (hereinafter "**Musyoka**"). The events leading up to the death of the deceased were as follows:-

Mweni testified that she resided in Magongo in Mombasa on the same plot as the appellant. On 2nd March 2003 at about 2.30 pm she was informed that there was a visitor from her home looking for her. She returned to her room in the house and met the visitor who she called **Shoro** but who was also known as **Isilovo Kilonzo Mbunga** (hereinafter "**the deceased**"). They stayed together for a short while and then went to the Klip Kiosk before returning to Mweni's room at about 9.30 pm. The room was a single room lit by a kerosene lamp. At about 9.40 pm there was a loud knocking on her door which was being kicked. Mweni asked who was knocking and the reply was that he was the owner of the house. Mweni, however, recognised the voice as that of the appellant, **Rodgers Kyanga** (hereinafter "**the appellant**") who lived in the next door room. The appellant then locked the door of Mweni's room from the outside, Mweni and the deceased being still inside.

Mweni then called to her neighbour **Musyoka** (PW2) to unlock the door to her room from the outside. Mweni also asked Musyoka to take the deceased to Mweni's father's room which was nearby. As the deceased came out of the room the appellant pushed between the deceased and Musyoka. The deceased

ran ahead and the appellant followed him.

Mweni stood by her door. She could see what was happening by the light of her neighbour's paraffin lamp. She saw the appellant chase the deceased towards the main door with Musyoka following them. Mweni then followed them and when she reached them outside she saw the appellant:

“taking a knife in the drainage trench”

and then she saw the deceased lying down on his back bleeding.

Mweni then ran to her uncle's (*Musila Githuku*) room about 50 metres away to get help to take the deceased to the hospital but when she got back she found that the deceased was already dead.

Mweni further stated in her evidence that:

“as the appellant washed the knife I was able to see as someone flashed a torch on him.”

The appellant did not talk to Mweni when she found the deceased dead. Mweni said that she had known the appellant for about a year. He was her neighbour in the building. She had no relationship with him.

In cross-examination Mweni said that when the appellant was knocking on her door he was saying that the room was his as he paid its rent. Mweni claimed that she rented the room for only one month. She said that the appellant was carrying something in his hand when he chased Shoro. It was a knife.

The appellant made an **unsworn statement** and called no witnesses. The gist of that statement was that when he was in his room he heard noise of people shouting that someone had stabbed another and had run away. He went out of his room to see what was happening. He found many people outside. Before he could go to where the stabbed man was two people shouted that he was the one who had stabbed the man. He was then beaten by the two and the members of the public. They threatened to lynch him. The police came and rescued him from the public. He was taken to the police station. On the next day he went with the Police to his house so that he could lock it up. While there, one police officer picked a knife from his house and washed it as it had *ugali* remains on it and took the knife away. The knife produced as an exhibit was, he said, not the one that had been taken from his house. The appellant denied all involvement in the murder of the deceased.

With regard to the knife, PW6, IP. Joseph Matiku gave evidence to the effect that with PC Vinto and PC Mwangi took the suspect (*the appellant*) to appellant's house which they searched and found nothing. The appellant showed them where he had thrown a kitchen knife outside in a waste trench. They searched and recovered the knife in muddy water. It was the appellant who pulled the knife from the mud.

In his judgment the trial Judge did evaluate the evidence in detail. In his submissions Mr. Opolu, learned counsel for the appellant, attacked the evaluation by the Judge saying that the Judge wrongly stated that:

“when he, (Musyoka, PW2), opened Mweni's door and the deceased came out the appellant grabbed the deceased's shirt but he (Musyoka) pushed the appellant aside and the deceased ran away with the appellant following in hot pursuit.”

The grabbing of the shirt, Mr. Opolu correctly submitted, was not part of the evidence but we do not consider this error was sufficiently significant to fault the judgment. It was clear from the evidence of Mweni and Musyoka that the appellant gave chase to the deceased who ran away when he emerged from Mweni's room after Musyoki had unlocked it.

Mr. Opolu also submitted that the Judge was wrong in stating in the judgment that:

“I think that Musyoka must have been mistaken when he said that Mweni did not get out of her house

not forgetting the fact that his attention was on the accused and the deceased and not Mweni.”

This, Mr. Opolu submitted, was mere speculation by the Judge. What Musyoka had said in his evidence was:

“when the deceased ran away and the appellant chased him I followed him slowly. I did not see PW1 out of her room at that time. I got out of the building after about one minute.”

What PW1 Mweni said in her evidence as to this point was:

“I was standing at my door at that time. There was a neighbour with a paraffin lamp near. Appellant chased Shoro towards the main door of the building with Musyoka following them. I also followed them.”

We do not consider there is ground for material criticism of the judgment of the superior court on this score.

As is clear from the above summary of the appellant’s unsworn statement, the appellant’s claim was that he was not present when the door to Mweni’s room was unlocked by Musyoka and he remained in his room until he heard the shouts of people that someone had been stabbed.

Mr. Bosire, learned counsel for the appellant, at the trial, cross-examined PW6, IP Joseph Matiku, who was in charge of crime at Changamwe Police Station to whom the case had been assigned. It was he together with PC Vinto and PC Mwangi who took the appellant to the scene on the afternoon following the death of the deceased. PW6 stated that the appellant showed him where he had thrown a kitchen knife outside in a waste trench. PW6 stated that the appellant was the one who pulled the knife from the mud and handed it to them. In cross-examination PW6 said:

“the deceased was stabbed in the chest (left side). There was no struggle. It appears the deceased just stabbed the deceased. He injured himself on the knife and we got him treated. It is not true that it is the deceased who had the knife and that the appellant was injured when he was struggling to grab the knife from the deceased.”

Mr. Opolu, learned counsel for the appellant at the hearing of the appeal before us put forward the theory that:

“ if the deceased was carrying the knife the cut wounds to the appellant could have been in a struggle for the knife. If the appellant had the knife his fingers would not be cut.”

It was pointed out to Mr. Opolu by the court that he should not be putting forward theories as to what happened unless it was on the instructions of his client. Mr. Opolu was given the opportunity to take instructions from the appellant in the dock and then stated to the Court that he was instructed that

“there was a struggle between the appellant and the deceased but the appellant does not know how the death occurred. The appellant was cut on the hand. The appellant was injured but it was dark – it happened in the course of the struggle.”

It is clear from this that there is no issue in this case as to the identification of the appellant as the person involved in the struggle that took place resulting in the death of the deceased. We accept the evidence of Mweni that she saw the appellant holding a knife when the pursuit of the deceased by the appellant began outside her door.

This being a first appeal we have ourselves evaluated the totality of the evidence and having done so, we are satisfied beyond reasonable doubt that, in the course of the struggle between the appellant and the deceased, the appellant did indeed stab the deceased in the deceased’s left armpit with a knife which stabbing was the direct cause of the deceased’s death.

The appeal is hereby dismissed.

Dated and delivered at Mombasa this 28th day of July, 2006.

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

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR