IN THE COURT OF APPEAL

AT KISUMU

(CORAM: OMOLO, GITHINJI, JJ.A. & ONYANGO OTIENO, AG. J.A.)

CRIMINAL APPEAL NO. 1 OF 2004

BETWEEN

ROBERT ONCHIRI OGETO……..…..……. APPELLANT

AND

REPUBLIC.…….....…… RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Kisii (Mr Justice Wambilyanga) dated 3rd September 2003

in

HCCRC No 36 of 2002)

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JUDGMENT OF THE COURT

The appellant was convicted by the superior court of the offence of murder contrary to section 203 as read with section 204 of the Penal Code and sentenced to death as prescribed by law. He appeals to this Court on nine grounds.

The particulars of the charge stated that the appellant murdered Geoffrey Mogesa Ongere (deceased) on 4th day of August, 2001. The prosecution called seven witnesses at the trial namely, Douglas Nyamwea Onkoba (PW1) (Onkoba), Edwin Omwenga (PW2) (Omwenga), Corporal Rueben Ambani (PW5) (Ambani), IP Samuel Mbata (PW6) (Mbata) and PC Francis Juma Misiko (PW7) (Misiko).

The prosecution case was founded on the evidence of Onkoba and Migiro because it is the evidence of the two witnesses which connected the appellant with the murder of deceased. Onkoba testified that deceased went to his home at 1 pm to help him (Onkoba) to carry cabbages from the *shamba* to the roadside where Onkoba was to sell them. They worked until 7 pm when they started going to a kiosk to buy meat. On the way they met the appellant who was running from his home. The appellant who was carrying two knives chased Onkoba and the deceased. Both Onkoba and deceased ran away, deceased being behind Onkoba. The appellant chased them; caught up with the deceased and stabbed him with a knife on the chest. Onkoba who saw appellant stab the deceased scream and appellant ran away with the two knives. Meanwhile, Migiro who was going home at about 7 pm met the appellant running. The appellant had two

knives and was accompanied by a dog. The dog went to Migiro and Migiro stopped. The appellant then ordered Migiro to kneel down and Migiro identified himself as nephew of the appellant. The appellant put a knife on Migiro's chest but Migiro begged appellant to spare his (Migiro's life). The appellant then wiped blood from one knife on Migiro's jacket and then went away. Migiro then had screams from near his home on the lower side and ran there. He found deceased on the ground with stab wound on the chest. Deceased was taken to Keroka Nursing Home but was pronounced dead on arrival. The incident was reported to Keroka police station and soon after appellant appeared at the police station and reported that his house had been set on fire. He was however, identified to the police as the person who had stabbed the deceased and was arrested.

The appellant gave a short unsworn statement at the trial. He stated that on the material day at about 7.30 pm he was in his house when he had noise from outside. He noticed that his kitchen was on fire and people were shouting that he should be arrested. The appellant then ran to Keroka police station and reported that people wanted to hurt him for nothing but he was put in cells and later charged with offence of murder.

This is a first appeal and the Court has a duty to reconsider the evidence which was before the superior court; evaluate the evidence and draw its own conclusions giving due allowance for the fact that it has neither seen nor heard the witnesses- see *Okeno vs Republic* [1972] EA 32, *Ngui v Republic* [1984] KLR 729 and *Njoroge v Republic* KLR 197. Nevertheless a court of appeal will not normally interfere with a finding of fact by the trial court, unless it is based on no evidence or misapprehension of the evidence, or the trial judge is shown demonstrably to have acted on wrong principles in reaching the decision- *Chemagong v Republic* [1984] KLR611; *Kiarie v Republic* (1984) KLR 739.

The postmortem on the body of the deceased was done by Dr.Ondigo Steven. The postmortem report was produced as exhibit at the trial by corporal Ambani under section 77 of the Evidence Act. One of the grounds of appeal is that the trial court erred in receiving the postmortem report which was inadmissible. Mr Gichaba, learned counsel for appellant, submitted before us that the postmortem report does not have probative value as it is hearsay evidence since Dr Ondigo Steven was not called as a witness. Section 77 (1) of the Evidence Act allows such document under the hand of a medical practitioner to be used in evidence. By section 77 (2) of the Evidence Act, the Court is allowed to presume that the signature to any such document is genuine and the person signing it held the office and qualification which he professes to hold at the time he signed it. The appellant was represented by counsel at the trial who did not object to the production of the postmortem report under section 77(1) of the Evidence Act and the Court did not see it fit to summon Dr Ondigo Steven for examination. Nor did the appellant's counsel ask for the calling of the doctor for cross-examination. In our view the postmortem report was properly admitted as evidence in accordance with the law.

The postmortem report shows that deceased had a stabed wound on the right ventricle with exit on the left ventricle of the heart and that the cause of death was intrathoracic haemorrhage secondary to penetrating injury to the heart caused by a sharp object. The cause of death was not an issue at the trial. We are satisfied that the learned judge made a correct finding on the evidence before him that deceased died due to the stab wound on the chest which was inflicted on the material day.

The appellant also raised the ground that the superior court erred in law in failing to analyse the alibi set forth by the appellant and accordingly arrived at a skewed finding. Mr Gichaba submitted that the appellant informed the investigating officer that he was at his mother's house and referred to a statement under inquiry which the appellant made on 5th August, 2001. The appellant said in his unsworn statement in his defence that he was in his house preparing to go to his mother's house when people went to his home. That was much later after the deceased had been stabbed with a knife. The appellant did not say in his unsworn statement that he was not at the place where the deceased was stabbed at the time deceased was stabbed. The appellant was committed to the superior court for trial by the Resident Magistrate's Court under the repealed committal proceedings and after committal he was given the alibi warning in terms of *section 235(b)* of the Criminal Procedure Code (now repealed). The appellant's counsel at the committal proceedings is recorded to have stated:

“The accused is not raising any alibi”.

The terms of the alibi warning required an accused person, among other things, to supply details of where he was and names of his witness and warned an accused person that if he did not comply with the terms of the alibi warning he may be prevented at the trial in the superior court from saying that he was not present when the alleged offence occurred.

It is clear that the appellant did not raise the plea of alibi at the trial and that the alleged alibi is contained in an extra judicial statement which was neither produced nor relied on at the trial.

The main ground of appeal in our view, was ground No 5 which states:

“ The learned trial judge erred both in law and in fact in failing to analyse the defence case as against the prosecution case at (sic) the detriment of appellant”.

This ground was not however argued or clearly presented to court. The learned judge correctly appreciated that the prosecution case depended on the veracity of the evidence of Onkoba and Migiro and found as follows:

“According to PW1, he succeeded in escaping from the accused whose intentions were manifestly violent and aggressive towards him and the deceased; and that the deceased was not as lucky as himself and that accused easily caught up with him and stabbed him with one of the knives which he had before he went away leaving (sic) for dead. It is crystal clear that as the accused was going away, he met with PW3 out of whom he scared hell with the very same knives one of which he had used against the deceased and callously cleaned blood (obviously blood of the deceased) on the jacket of PW3 before he heeded the passionate entreaty of the scared PW3 and spared his life. From the evidence of PW3, it is also undoubtedly clear that the accused could easily have inflicted on him the injuries similar to the one had just inflicted on the deceased. PW3 therefore, considered himself very lucky to have survived. Thus the cogent evidence of PW1 coupled with the graphic and credible evidence of PW3 conclusively proves that the accused is definitely the one who inflicted the fatal injury on the deceased. To hold otherwise would be unrealistic and absurd, particularly, in light of the evidence of these two credible and reliable witnesses.”

In this appeal, it has not been said or shown that those findings of fact by the superior court were based on no evidence or on misapprehension of the evidence nor was it shown that the superior court had acted on wrong principles in reaching at those findings. It is trite law that a fact can be proved by the evidence of a single witness although there is need to test with greatest care the identification evidence of such a witness especially when it is shown that conditions favouring a correct identification were difficult – see *Marube & Another v Republic* [1986] KLR 356. Further, the Court, has to bear in mind that it is possible for a witness to be honest, but to be mistaken –*Kiarie v Republic* (*supra*). In this case, Onkoba was subjected to intense cross-examination but his evidence was not shaken and it remained consistent all through. He knew the appellant before. In fact the evidence of Onkoba, Migiro and the evidence of PC Misiko show that the appellant, Onkoba and Migiro come from the same neighborhood. Migiro also knew the appellant before. Onkoba said that deceased was stabbed at about 6 pm and that there was sunlight. Similarly, Migiro testified that it was not yet dark when the appellant attacked him. The evidence of Onkoba and Migiro regarding the identification of the appellant at the material time was not seriously challenged in this appeal. Further, it is apparent from the record that the evidence of Migiro was not seriously challenged at the trial. This was a case of recognition.

Having evaluated the evidence and having considered all the above factors we are satisfied that the evidence of Onkoba and Migiro was credible, reliable and free, from doubt. We are satisfied like the trial judge and the assessors who sat with him, that that evidence conclusively proved that it was the appellant who inflicted the fatal injury on the deceased.

Mr Gichaba further submitted that malice aforethought was not proved as the motive of the attack was not established and that the appellant should have been convicted of the lesser offence of manslaughter.

The prosecution does not have to prove the motive for commission of any crime, neither is evidence of motive sufficient by itself to prove the commission of a crime by the person who posses the motive. See *Karukenya & 4 Others v Republic* [1987] KLR 458. By section 206 (a) of the Penal Code, malice aforethought is deemed to be established by evidence showing an intention to cause death or to do grievous harm. It can be reasonable inferred that when the appellant stabbed deceased with a knife on the chest he intended to cause death or grievous harm to the deceased. That being the case, we are satisfied that the appellant was properly convicted for the offence of murder.

For the foregoing reasons this appeal has no merit and is dismissed

Dated and delivered at Kisumu this 26th day of March, 2004.

R. S. C. OMOLO

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

.....

AG. JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR