REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT KISUMU
(CORAM: TUNOI, WAKI, JJ.A & DEVERELL, AG. J.A)

CRIMINAL APPEAL NO. 206 OF 2004

SIMION MAGAK OSELU …… APPELLANT

AND

REPUBLIC …… RESPONDENT

(Appeal from conviction and sentence of the High Court of Kenya at Kisii (Wambilyangah, J) dated 27th September, 2002 in

H.C. Cr. Case No. 3 of 2001)

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JUDGMENT OF THE COURT

SIMION MAGAK OSELU, the appellant, was on 27th August, 2002, convicted of murder contrary to section 203 as read with section 204 of the Penal Code and was thereafter sentenced to death. According to the Information filed by the Attorney General, the appellant murdered **Mary Akinyi Okuru,** the deceased, on 19th December, 1999, at South Kanyaluo, Kamenya sub-location in Rachuonyo district of the Nyanza Province.

The prosecution presented the following facts to the trial court. The deceased who was the wife of the appellant was also the niece to Dina Opudo **(PW 2),** the wife of Joash Koyo **(PW 1).** On 15th December, 1999, the deceased arrived at the couple's home and found PW 2 there. A few hours afterwards, the appellant followed and informed PW 1 that his wife had run away from him. **PW 1** called the deceased and questioned her in the presence of the appellant whether she was the wife of the appellant and why she had deserted him. The deceased stated that it was true she was cohabiting with the appellant but she no longer wished to live with him as his wife. The appellant then went away.

Four days later, on 19th December, 1999, at about 7.30 p.m., the appellant and his cousin known as Ochieng returned. They were welcomed by PW 1 and PW 2, invited to supper, and stayed on. At about 10 p.m. the appellant and Ochieng begged for permission to leave. The deceased who had mostly confined herself to the kitchen was asked by PW 1 to escort the visitors. She did so but a few minutes after they left the house, the deceased shouted and cried –

"Adhir has stabbed me with a knife".

Both **PW 1** and **PW 2** rushed to the scene and saw the appellant and Ochieng running away. PW 1 made some attempt to apprehend them but they were too fast for him. They disappeared into the darkness.

According to **PW 2,** the deceased had introduced the appellant to her as Adhir. The Assistant Chief of Kamenya sub-location, Eric Obado (PW 3) testified that the appellant resided in his area and was known as **Adhir Magak.**

The deceased was rushed to Gendia Hospital but, unfortunately, she succumbed to her injuries and died two days later. The post mortem report on her body was carried out by Dr. Kembe who could not be found to produce it to the trial court. The learned State Counsel, Mr. Omutelema, informed the court that the witness was not easily available and looking for him would create undue delay in concluding the trial. He sought the leave of the court for Pc. Joseph Kipng'eno (PW 4) who had witnessed the autopsy to produce the report. Mr. Nyasimi who represented the appellant in the trial informed the learned Judge that he had no objection to the application by Mr. Omutelema; and consequently, the post mortem form was tendered in evidence. The cause of death was given as due to cardio-pulmonary arrest secondary to internal haemorrhage. However, before us, Mr. Odunga, for the appellant, submitted that the learned trial Judge erred in relying on the post mortem report produced by a person other than the maker when no basis was laid for taking that course.

It is clear from the record that the post mortem report was produced under section 77 (1) of the Evidence Act which provides that:

> **"In criminal proceedings any document purporting to be report under the hand of a Government Analyst, medical practitioner ….. upon any person, matter or thing submitted to him for examination or analysis may be used in evidence."**

We note that the death of the deceased was not in dispute nor was its cause.

Moreover, Mr. Nyasimi who was present never raised objection to the course adopted by the prosecution. Nor did he indicate that he might want to examine Dr. Kembe on the post mortem report. We are satisfied that proper basis under the section had been laid before production of the report. It is also our view that the production of the post mortem report by **PW 4,** rather than by Dr. Kembe himself, did not occasion any failure of justice to the appellant. Ground 6 of the Memorandum of the Appeal must therefore fail.

The appellant in his sworn testimony before the trial court stated thus:

> **"I am 44 years. I am married with 3 children. I did not know the deceased Mary Akinyi. I am not aware that she was murdered and if she was murdered I do not know who murdered her. I did not go to the home of Joash Koyo and his wife Dina (PW 1 and PW 2). I even do not know them. I do not know why they lied against me. My wife is Milka Adhiambo and I had not married another wife."**

In a reserved judgment delivered after the assessors had returned a unanimous opinion of guilty, the learned Judge held, inter alia , that the stab injury on the body of the deceased is consistent with the evidence of both **PW 1** and **PW 2** in regard to the manner in which the deceased received the fatal injury. The learned Judge, also, held that as the elderly couple had known the appellant since his youth and as the appellant had been to its home before the fateful evening, the question of mistaken identity did not arise.

Again, the learned Judge found that the appellant had a motive to kill the deceased and dismissed his denials.

In the appeal before us, Mr. Odunga has submitted in grounds 3, 4 and 7 of the supplementary Memorandum of Appeal that the circumstantial evidence accepted by the learned trial Judge did not meet the standards for convicting on such evidence and that his decision was based on speculation. Mr. Odunga further contended that it was erroneous on the part of the learned Judge to rely on the dying declaration of the deceased without considering the circumstances surrounding the admission of such declarations, the manner of admitting it and the weight to be attached to it. We remind ourselves that as a first appellate court, we are duty bound to reconsider the evidence, evaluate it and draw our own conclusions in deciding whether or not the judgment of the trial court should stand (see **OKENO V REPUBLIC [1972] EA 32).**

In doing so, we are obliged to bear in mind the conclusions of that court in this matter and also that unlike that court, we did not have the advantage of seeing and hearing the witnesses testify. Such matters are important in the assessment of the credibility of witnesses. In view of that fact, we can only interfere with the findings of fact of the trial court in a clear case.

According to the evidence of **PW 1** and **PW 2**, the stabbing of the deceased occurred soon after the appellant, Ochieng and the deceased left the house. There is no evidence whatsoever on record to show that anyone else joined the trio or intervened between the visitors and the deceased before the killing. **PW 1** testified inter alia as follows:

> **"At 10 p.m. they (the appellant and Ochieng) said they wanted to leave. They went outside. I told Mary (deceased) to bid them goodbye. Mary then cried "she had been stabbed with a knife". I got out and noticed the accused and his friend running away. I tried to arrest them but was unable to do so."**

The testimony of PW 2 as to what happened immediately the appellant and Ochieng left the home of the couple, to some degree, corroborates that of PW 1. She testified thus:

> **"As they were leaving I asked Akinyi (deceased) to go and bid them goodbye, but she soon shouted that Adhir had stabbed her with a knife. I rushed to where she was. She had fallen down and ….. her intestines were out."**

From the foregoing, we observe that when the deceased left the home of **PW 1** and **PW 2** she was in the company of the appellant and Ochieng. Immediately thereafter, she shouted that she had been stabbed by the appellant who together with Ochieng ran away and vanished into the darkness. We find, in the circumstances, that the only conclusion one can derive from the evidence reproduced above is that the appellant, or jointly with Ochieng, and indeed no one else, must have stabbed and killed the deceased.

The appellant's conviction was, to a large extent, based on circumstantial evidence since there was no eye witness to the stabbing. In **R.V Kipkering Arap Koske and Another (1949) EACA 135 at p. 136** the Court of Appeal for Eastern Africa made the following observation relating to circumstantial evidence in criminal cases:-

> **"As said in Wills on "Circumstantial Evidence" 6th edition at p 311, "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 burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution and always remains with the prosecution. It is a burden which never shifts to the party accused".**

In the present appeal, the appellant and Ochieng were the last persons to be seen with the deceased as they left the home of **PW 1** and **PW 2.** The circumstances from which an inference of guilt can be drawn, are in our view, cogent and firmly established.

They, also, point unerringly towards the guilt of the appellant. Again, the circumstances taken cumulatively, form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the appellant and no one else.

Mr. Odunga has further submitted that the learned Judge placed undue weight to the so-called dying declaration by the deceased. In Jasunga Akumu vs. R. (2) [1954] E.A.C.A at p. 634 –

> **"The question of the caution to be exercised in the reception of dying declarations and the necessity for their corroboration has been considered by this Court in numerous cases, and a passage from FIELD ON EVIDENCE (7th Edition) has repeatedly been cited with approval:**

> **"The caution with which this kind of testimony should be received has often been commented upon. The test of crossexamination may be wholly wanting; and ---- the particulars of violence may have occurred under circumstances of confusion and surprise calculated to prevent their being accurately observed ----. The deceased may have stated his inferences from facts concerning which he may have omitted important particulars, from not having his attention called to them."**

In the case of **Okale vs. Republic [1965] E.A. 555** the Court of Appeal for East Africa said (after reference to **Jasunga Akumu** case) at page 558:

> **"Particular caution must be exercised when an attack takes place in darkness when identification of an assailant is, usually, more difficult than in daylight (R.V. Ramazani bin Mirandu (1934), I, E.A.C.A. 107; R. V. Muyovya bin Msuma); The fact that the deceased told different persons that the appellant was the assailant is evidence of consistency of his belief that such was the case: it is no guarantee of accuracy."**

In the killing before us, the deceased was stabbed at night. She identified her attacker. The appellant and the deceased had been together for over 2½ hours and the attack took place shortly after leaving the home of PW 1. The dying declaration was elaborate and irresistibly pointed a finger at the appellant and to no one else. Moreover, in our view, the dying declaration was consistent with the evidence of both **PW 1** and **PW 2** and was accurate.

We have analyzed the evidence before us as we must do, and the law applicable.

We are of the opinion that the case against the appellant was proved beyond all reasonable doubt and the conviction is safe and sound. We uphold it. We reject and dismiss the grounds of appeal advanced by the appellant.

In the result, this appeal is dismissed.

Dated and delivered at Kisumu this 3rd day of December, 2004.

P.K. TUNOI

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

W.S. DEVERELL

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AG. JUDGE OF APPEAL

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

DEPUTY REGISTRAR