REPUBLIC OF KENYA

COURT OF APPEAL, AT KENYA

CRIMINAL APPEAL NO 83 OF 2003

MUGOMA & ANOTHER V REPUBLIC

KWACH, TUNOI & GITHINJI JJ A

JUNE 13, 2003

(Appeal from a conviction and sentence of the High Court of Kenya

at Kisii (Wambilyangah, J) dated 20. 5. 2002 in

HCCR Case No 20 of 2000)

Criminal law *- murder - malice aforethought - appellants members of a vigilantes group - evidence that appellants killed the deceased - deceased suspected of theft - no evidence as to what actually happened immediately before or at the moment of the killings - contradictory testimony of the deceased's wife believed by trial judge - actual circumstances of the death not known - whether malice aforethought proved.*

Criminal law *- manslaughter - sufficient evidence that appellants killed the deceased - killing unlawful - no evidence of malice aforethought - whether appellants guilty of manslaughter.*

The appellants were members of a vigilante group who had killed the deceased after suspecting of being a thief. There was no evidence as to what actually happened immediately before or at the moment of the killing. The appellants had been convicted of murder on the contradictory testimony of the wife of the deceased even though the actual circumstances of the death were not clear. However, there was sufficient evidence that the appellants had taken part in the killing but no evidence was adduced to prove that they had malice aforethought. They appealed against both conviction and sentence.

Held:

1. The burden was on the prosecution to prove malice aforethought and that burden had not been discharged and as such a conviction of murder could not stand.

2. There was no doubt that the appellants caused the death of the deceased and that the killing was unlawful.

Conviction of murder substituted with manslaughter.

Cases

No cases referred to. Statutes

1. Penal Code (cap 63) sections 203, 204

2. Criminal Procedure Code (cap 75) section 322(4)

Advocates

Mr Ongele for Appellants

June 13, 2003, the following Judgment of the Court was delivered.

The appellants, Isaac Onyango Mugoma and Joshua Otieno Kasina, were jointly tried with the aid of assessors on an information charging them with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars contained in the charge were that on the night of 5th and 6th May, 1999, at Arambe Sub-Location in Migori District within Nyanza Province, jointly with others not before court murdered Patrick Ogonya Ambwere, hereinafter referred to as "the deceased". At the conclusion of the trial the assessors were of the unanimous view that the appellants were guilty of manslaughter. However, the learned Judge Wambilyangah J differed with them, found the appellants guilty of murder as charged and sentenced each of them to death. The appellants now appeal to this court against both the conviction and sentence.

Their memorandum of appeal contains in all two grounds which we list below:

> 1. That the learned trial judge erred in law and fact by allowing his perception of the crime tragedy to cloud his summing up notes and the subsequent judgment.
>
> 2. That the learned trial judge having appreciated that the appellants were vigilantes erred in law and fact by convicting the appellants and disregarding the opinion of the assessors.

Alice Muhanja (PW1), the wife of the deceased, testified that on the fateful night at about 3.00 am she and the deceased were asleep in their house and when they were rudely awoken by a noisy commotion outside their door. A group of people were ordering them to open the door. As the couple hesitated the impatient people outside furiously proceeded to break open the door. Once inside they pulled out the deceased and variously rained blows on him and thoroughly continued to beat him with sticks after which they dragged him out of the house and led him away.

It is apparent from the evidence tendered in court that the two appellants and others variously described as numbering about twenty were members of a local vigilantes group and had set out that night to round up all those people whom they thought were notorious village thieves with a view to taking them before the local Assistant Chief for interrogation. That night the deceased and four others were arrested and frog-marched to Oyani market. In this regard Bernard Omwa (PW 2) testified thus:-

> "There were 20 people or more. Isaac told me to kneel down and raise my hands. He went into my house and got a manila rope and came and tied my hands at the back. He then asked me to mention the names of people with whom I was stealing and when I failed to do so he struck me on the head and injured me. Other people hit me and moved me out of the fence. My mother was screaming. They had arrested 3 other people before they came to my house. I was made to walk together with other prisoners and we were taken to the home of Samson Odera Wayuga. Patrick wanted to go for a long call. Then Isaac hit him so hard until he sustained bruises on the back and on the left side of the body. They took us to the gate of Oyani Health Centre and left us there. <u>They left us saying that they were going to bring more thieves</u>. We were forced to walk to the gate of the area Chief Jairus Opati Were."

It is to be noted that Benard Omwa was a suspected thief whose evidence we have been asked by Mr Ongele, counsel for the appellants, to give little probative value.

It is not in dispute that the deceased succumbed to his injuries just at the gate of Oyani Health Centre and unfortunately died some few hours afterwards before he was rushed to the hospital for proper treatment. Dr Aludiva (PW11) saw the body of the deceased on 10th May, 1999 when he carried out a post-mortem examination on it. He noted that the body had numerous marks of blunt injury whip or *rungu.* The head had deep injury marks and the kidneys had been severely damaged. In the doctor's opinion the cause of death was shock secondary to severe blunt object injuries on the body.

The first question we have to deal with must be whether the appellants were among the group which seized the deceased from his house, beat him and caused him the injuries which resulted in his death. On this aspect of the matter, we really have little difficulty in coming to the conclusion that the appellants together with the other members of the vigilantes group and no one else killed the deceased. Mr Ongele has not challenged this assertion in his submissions before us. We do not think, therefore, that there can be any doubt whatsoever that the injuries the deceased had then sustained were those from which he died.

It is, indeed, apparent that the only substance in this appeal is whether malice aforethought was proved. In summing up to the assessors the learned judge drew their attention to the discrepancies and inconsistencies in the evidence and explained in detail the difference between murder and manslaughter. The assessors, however, unanimously entered a verdict of not guilty to murder but to manslaughter. In disagreeing with the assessors the learned judge said:-

> "So the assessors failed to appreciate that aspect of the law when they opined and said that the acccused are merely guilty of manslaughter. They (the assessors) thought that flogging and torturing suspected criminals is legitimate of course it is not. To agree with the assessors would be importing the barbaric law of the jungle into civilized lifestyle where the due process of the law should be the order of the day. Accordingly I differ from the opinion expressed by the assessors and find these two accused guilty of murder as charged herein. I convict them."

The learned judge, correctly so, was not bound to conform to the opinion of the assessors. He had a right under the law to disagree with them as he did. However, in addition to the role of the assessors granted by section 322 (4) of the Criminal Procedure Code, the assessors are of great importance in assessing contradictory evidence of what occurred in a particular case, and they may be able to guide a court as to the truth of what the witnesses have said. This may be one of the reasons why the Legislature mandated that in cases of murder all trials shall be with the aid of assessors.

It is common knowledge that the wanton killing of suspected thieves is all too common in Kenya. The difficulty, as exposed by this case, lies in the frequent lack of evidence as to what actually happens immediately before and at the moment of the killing. In the case now before us there is only the contradictory testimony of the wife of the deceased and that of the other victims of the vigilantes group which the learned judge believed. The actual circumstances of the death of the deceased are not known. In our view, the burden was on the prosecution to prove malice aforethought and that burden has not been discharged.

It must follow, then, that as that burden has not been discharged the conviction of murder cannot stand. We quash it. On the other hand, we are not in doubt that the appellants caused the death of the deceased and that the killing was unlawful. We therefore substitute a conviction for manslaughter. Each appellant is sentenced to five (5) years imprisonment from the date of conviction.