



IN THE COURT OF APPEAL

AT KISUMU

(Coram: Omolo, Githinji JJ A & Onyango-Otieno Ag JA)

CRIMINAL APPEAL NO 47 OF 2003

DAVID AGWATA ACHIRA APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from a conviction and sentence of the High Court at Kisii (Wambilyanga J) dated 7th March 2003 in HCCRC No 1 of 2000)

JUDGMENT

The appellant, David Agwata Achira, was convicted by Wambilyanga J, sitting with assessors at the High Court of Kenya, Kisii, of the offence of murder contrary to section 203 and 204 of the Penal Code and sentenced to death as prescribed by the law. The particulars of the offence stated that the appellant murdered one John Nyambati Nyarusa on 12 day of August, 1999 at Bokiambori sub location in Nyamira District.

He appeals to this Court on the grounds contained in the memorandum of appeal filed by the appellant personally and in the supplementary memorandum of appeal filed by Mr L G Menezes, the appellant's counsel.

On 12th August, 1999 Elizaphan Nyatika Ateyi (PW2) (hereinafter referred to as Elizaphan) arrived at his home from a meeting at about 4 pm. He was in the company of Henry Osoro (PW8) (hereinafter referred to as Henry), Osea Ateyi, (PW7) John Nyambati Nyarusa (deceased) and David Agwata Achira alias "Councillor", the appellant herein. It started raining and the four people took shelter from the rain in the house of Elizaphan.

While in the house the deceased asked the appellant as to which ward he represented as a councillor but the appellant did not answer him. According to Elizaphan the four people remained in his house for about one hour and after the rain had subsided the four people left his house. The four people were talking noisily and Elizaphan concluded that they were drunk.

Five minutes after the four people left, Elizaphan heard screams from the direction of the road and ran towards the road. He met Daniel Bosire Nyarusa (PW1) (hereinafter referred to as Daniel), a younger brother of the deceased, who told him that the "Councillor" had stabbed the deceased with a knife.

Elizaphan found the deceased lying on the ground and bleeding profusely from the left side of his chest. He asked deceased what had happened and the deceased told him that the "Councillor" had stabbed him with a knife. According to Daniel (PW1), he was at the home of one William Nyairo building a house

when one Engina Nyairo – a child, who was not called as a witness asked him to go and see his brother (PW1's) who was being beaten. Daniel then rushed to the road about 40 paces away. He found three people, Osea Ateyi, Henry who were standing close to deceased who was lying down and the appellant who was bending down to wipe blood from a knife. The appellant put the knife in the pocket when he saw Daniel and the three people started moving away. The deceased had been stabbed on the left side of the chest and was bleeding. Daniel reported to his other brother Collins Nyarusa Nyasimi (PW3) (hereinafter referred to as Collins) and to Jane Sigara Nyambati (PW4) (hereinafter referred to as Jane), the deceased's wife. Collins went to the scene. He found his elder brother (deceased) lying on the ground having been stabbed on the left side of the chest and bleeding profusely. He also saw the appellant, Henry and Osea Ateyi who gave evidence as Ishmael Omoro Kafuna (PW7), (hereinafter referred to as Ishmael) about 100 metres away walking from where the deceased had fallen. The deceased said that the appellant who was with Osea and Henry had stabbed him. Jane also went to the scene. She found her husband (deceased) on the side of the road near their land.

He was bleeding profusely and was groaning in pain. She asked him what happened and the deceased said that he was stabbed by "Councillor" as Henry and Osea Ateyi held him. Many other people went to the scene.

The deceased was then taken to Nyamira District Hospital but died while in the casualty department. The Post Mortem Report shows that he died on the same day 12th August, 1999 at 5.30 pm and that he had a stab wound about 2cm long on the left ventricle of the heart. The cause of death was cardio pulmonary arrest due to a stab wound on the left ventricle.

The brothers of the deceased Daniel and Collins led CI James Malela (PW10) and other police officers to the house of the appellant on the same day and he was arrested at about 8.30 pm. The house of the appellant was searched but the knife was not recovered.

The appellant gave evidence on oath at the trial. His defence was an alibi. He gave a detailed account of his movements on the material day from the morning until 7.30 pm when he returned home. He accused the prosecution witnesses of lying against him. He testified that Daniel had even visited him in prison on 10th March, 2001 and confessed that he had been coached by Collins to lie against him and asked for forgiveness. He claimed that he had employed Collins at one time but sacked him for misconduct after which, he, Collins, said that he would revenge.

The three assessors did not reach a unanimous decision. Two of them found the appellant not guilty while one found the appellant guilty. The learned trial judge disagreed with the assessors saying dismissively that the assessors did not evaluate the evidence objectively. The learned judge relied on the evidence of Daniel, Ishmael and Henry as truthful and reliable circumstantial evidence against the appellant. The learned judge also relied on the evidence of Daniel, Elizaphan, Collins and Jane as proving a dying declaration and found corroboration of the declaration in the evidence of Daniel, Ishmael and Henry.

In summary the appellant complains in his grounds of appeal that the evidence to support the prosecution case was not credible; that the learned judge failed to direct himself and assessors that the evidence of Ishmael and Henry was accomplice evidence and required corroboration and that the learned judge misdirected himself by failing to give sufficient attention to the appellant's defence in particular the evidence that Daniel visited him in prison and apologized for falsely implicating him and that the dying declaration was not reliable.

This is a first appeal. This Court as the first appellate court is required to reconsider the evidence, re-evaluate the same and draw its own conclusions and 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 *Okeno v Republic* [1972] EA 32 and *Ngui v Republic* [1984] KLR 729).

As the learned judge correctly directed himself there was no direct evidence to show that it was the appellant who in fact stabbed the deceased with a knife and the prosecution case was solely based on circumstantial evidence and on a dying declaration.

Before proceeding further we note from the evidence of Elizaphan and Henry that there are two inconsistent versions of what the deceased, appellant and others were doing at the house of Elizaphan. According to Elizaphan the four persons went to his house to shelter from rain. But according to Henry, there were many people at the home of Elizaphan who were drinking changaa as they sheltered from rain. The people who were drinking changaa included the appellant, deceased and himself. The learned judge did not touch on any of the two and he did not even point out to the assessors the divergence in the evidence which preceded the stabbing of the deceased.

The quality of the circumstantial evidence and the tests that such circumstantial evidence must satisfy before a conviction can be founded on it has been laid down in many local decisions eg *Simon Musoke v Republic* [1958] EA 715 and *James Mwangi v Republic* [1983] KLR 327.

The evidence of Daniel that he found appellant bending to wipe blood from his knife as deceased was lying down with a stab wound was heavily relied on by the learned judge as the strongest piece of the circumstantial evidence. But the witness did not see the knife properly for he stated that the appellant quickly folded it and kept it in his pocket and that he could not tell what type of a knife it was. The witness did not also say how far the appellant and the other two people were when he saw them. Collins found the appellant and the other two people were when he saw them.

Collins found the appellant and the other two people at the scene. He testified that the appellant and the other two people were one hundred metres from where the deceased was lying. Later in his evidence in cross-examination he stated that the appellant and other two people were two hundred metres away. Concerning the evidence of Daniel the learned judge failed to consider and evaluate the evidence of the appellant that the witness had visited the appellant in prison on 10th March, 2001 and had apologized for having given fabricated evidence against the appellant. The learned judge also failed to direct the assessors on that aspect of the evidence.

The evidence of the appellant about the visit of Daniel to the prison was verified by the Remand Visitors Book from the prison. According to the evidence of Henry, the house of Elizaphan is about two hundred metres from the scene. Elizaphan heard the noise and went to the scene immediately. He did not say that he found the appellant, Henry and Osea Ateyi at the scene. His evidence was that he found many people at the scene.

Again Jane who arrived at the scene at the same time as Collins did not find the appellant and the two other people at the scene. There was no evidence that the appellant and the other people attempted to run away.

The appellant did not go into hiding as he was found in his house when the police went there later. The many people who went to the scene did not attempt to arrest the appellant. Those co-existing circumstances in our view weaken the evidence of Daniel and his brother Collins that they found the appellant at the scene.

The learned trial judge relied on another piece of circumstantial evidence that Ishmael and Henry saw the appellant fleeing from the scene for he said in part:

“Then PW2 and PW8 testified that the Councillor was none other than the accused and PW7 and PW8 swore that they saw the accused fleeing from the direction where the deceased had been assaulted at the very same time when people or Daniel Bosire Nyarusa (PW1) was shouting as he ran after the Councillor (accused)”.

That is a serious misdirection for Ishmael and Henry did not say that they saw the appellant fleeing from the scene and Daniel did not in fact say that he ran after the appellant. The evidence of Ishmael and Henry was in any case accomplice evidence which was not corroborated and therefore unreliable.

Lastly, on the evidence of a dying declaration, the learned judge said in part:

“whereas there is here a dying declaration there is no suggestion that the deceased himself was mistaken as to the identity of his assailant particularly when the aspect of identification of the accused is corroborated

by the evidence of particularly PW1 who found him cleaning blood from the weapon used to injure the deceased who was visibly injured and was pointing at the same as his assailant and that if PW7 and PW8 who said they saw the accused flee from the spot where the deceased (who had been with them) was mortally wounded...”.

The law on dying declarations in Kenya was laid down in the case of *Pius*

Jasunga s/o Akumu v R (1954) 21 EACA 331 which was cited with approval in the case of *Okale v Republic* [1965] EA 556 relied on by the appellants counsel. The case *Okale v R* (supra) was in turn followed in *Aluta v Republic* [1985] KLR 543 where it was held at page 547 paragraphs 5-10 thus:

“In every criminal trial a conviction can only be based on the weight of the actual evidence adduced and it is dangerous and inadvisable for a trial Judge to put forward a theory not canvassed in evidence or in counsels’ speeches. A trial judge should approach the evidence of a dying declaration with necessary circumspection. It is generally speaking very unsafe to base a conviction solely on the dying declaration of a deceased person made in the absence of an accused and not subject to cross-examination, unless there is satisfactory corroboration”.

It will be observed that Elizaphan, Collins and Jane who claimed that the deceased told each who had stabbed him had earlier been told by Daniel that it is the “Councillor” who had stabbed the deceased.

Further, the evidence of those three witnesses was not consistent on exactly what the deceased told each of them.

The evidence of the appellant that Daniel visited the appellant in prison and apologized was not rebutted. As the evidence of Daniel has been discredited it would not have corroborated the dying declaration. It is a misdirection by the learned judge to find that the evidence of Ishamael and Henry who are among the people mentioned by the deceased adversely can again corroborate the deceased’s dying declaration. In the above circumstance, the dying declaration was not reliable.

From our own evaluation of the evidence we are satisfied that the conviction cannot be safely sustained and that Mr Musau the learned state counsel properly conceded the appeal against the conviction.

We accordingly, allow the appeal quash the conviction and set aside the sentence. We order that the appellant be released forthwith unless lawfully detained for another offence.

Dated and delivered at Kisumu this 28th day of November, 2003

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

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Ag JUDGE OF APPEAL

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

DEPUTY REGISTRAR