IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KWACH, SHAH & BOSIRE JJ A)

CRIMINAL APPEAL NO 126 OF 2001

BETWEEN

MARTIN KIMEU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court at Nairobi, Etyang J, dated 15th May 2000,

in

HCCr No 2 of 2000)

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JUDGMENT OF THE COURT

Martin Kimeu, the appellant, then a police constable was on 30th January, 1997 arraigned before the superior court (Etyang J) on an information alleging that on the night of 26th and 27th November, 1995, at Jamhuri Police Post within Nairobi area he murdered Kennedy Omondi Omole, the deceased, contrary to section 203 as read with section 204 of the Penal Code. Following his denial of the charge, he was later tried with the aid of assessors, was found guilty, and was thereafter convicted as charged and sentenced to the mandatory death sentence for the offence. In the present appeal he has challenged both the conviction and sentence. The appellant has proffered five grounds in support of his appeal, namely:

> "(1) That the learned trial Judge erred in failing to appreciate that there was variance between the particulars of the charge and the evidence regarding the date the offence regarding the date the offence was committed.
> (2) That the learned trial Judge erred in law by failing to resolve in the appellant's favour glaring contradictions in the evidence given by prosecution witnesses.
> (3) That the learned trial Judge erred in law in failing to observe that the prosecution did not call essential witnesses.
> (4) That the learned Judge erred in law in basing the appellant's conviction on uncorroborated circumstantial evidence.
> (5) That the learned Judge erred in law and misdirected himself by rejecting the appellant's defence which was supported by the evidence of a prosecution witness."

This is a first appeal. That being so we are obliged to review the evidence in order to determine whether

the conclusions reached upon that evidence should stand. But as was stated by Sir Kenneth O'Connor, P. (as he then was) in the case of *Peters v Sunday Post* [1958] EA 424, it is a jurisdiction which should be exercised with caution as unlike the trial Judge, we did not have the benefit of seeing and hearing the witnesses testify. We are however free to draw our own conclusions on the evidence without overlooking those of the trial court.

As we stated earlier, the appellant was at the time of his trial a police constable stationed at the Jamhuri Showground Police Post, Nairobi. He is alleged to have inflicted a fatal shot wound on the deceased who was then held prisoner at the post in connection with the loss of a radio cassette he had borrowed from one Robert Odhiambo Otieno (PW1) but which he did not return. The loss of the radio cassette and how and when the deceased was arrested is not relevant to the decision in the present appeal, and so we say no more on that.

The deceased was kept in a cell at Jamhuri Police Post, alone. The Post had only two cells, one for males and the other for females. Apart from the deceased there was no other inmate in the cells. When the appellant reported on duty at the police post on 25th November, 1995 at about 11 p.m the position was the same. The appellant took over duties at the police post from one Ngari, a police constable. Jonnes Mbithi, (Mbithi) also a police constable, joined him at or shortly after 11 p.m and together they were supposed to man the police post until about 7 a.m the next day. It was common ground that only the appellant was armed. According to the prosecution he had a patchet with 25 rounds of 9mm caliber ammunition. The appellant however stated that he had more rounds of ammunition than that. The trial Judge, after assessing the evidence, concluded that the appellant had been given 25 rounds of ammunition. There is however no evidence on record as to how many rounds of ammunition were issued to the appellant.

n his evidence Mbithi testified that when he reported on duty he was not in full uniform as he was supposed to be. So he went into the cell for females which was then vacant in order to put on his uniform. It was his evidence that apart from the appellant and the deceased there was no other person at the police post. As to what happened at the report office while he was still changing can only be gathered from the evidence of the appellant and statements he made to the police subsequently.

It was the appellant's story that the deceased knocked loudly on his cell door, and when he went to find out why he was knocking, the deceased told him that he wanted to answer a call of nature. He opened the door and let out the deceased. It would appear from the evidence that the toilets were not within the building. This is what the appellant is recorded to have said in that regard:

> "I opened the cell and took the inmate out. He followed me a step behind. When I reached at the doorstep of the report office from the radio room I saw two people coming towards the office in a quick pace."

In his statement under inquiry which he recorded four or so days later the appellant stated as much. Likewise in his charge and caution statement the story was the same.

The appellant's defence is based on what he said happened thereafter. He stated that as he was leading the way to show the deceased where the toilet was he saw two people hurriedly walking into the report office with one of them pointing a pistol at him. He stated that he had left his gun under the counter at the report office. So when he saw the two people approaching the report office menacingly, he ducked to pick his gun. Before he could rise he heard a gun shot. He was ready to fire back, but when he pulled the trigger he realized that he had not cocked his gun. By the time he was able to cock it the two men had escaped. He nonetheless fired two shots in the direction they had gone but apparently missed them. Thereafter when he turned to look behind he saw the deceased on the ground groaning in pain, saying he was dying. He had a bullet wound on his chest.

When Mbithi came out of the female cell, it was his evidence that he found the deceased lying down outside his cell and the appellant was standing next to him. It was further his evidence that while he was in the cell for females he heard several gun shots. In his view the first gun shot was at close range. What did the appellant tell him had happened? In his evidence Mbithi stated that the appellant reported to him

that two people had raided the Police Post and fired a pistol directly at him as he was taking the deceased to the toilet. The raiders thereafter escaped.

Mbithi and the appellant searched the vicinity of the police post but did not see anybody. They sought and obtained reinforcement from the police lines within the showground but their combined search did not yield any positive results. The watchmen manning the only two gates into the showground denied they had seen any strangers escaping out of the showground. None of those watchmen was called to testify.

The appellant's defence was simple and short. The deceased was shot by those who raided the police post. His counsel, Mr O.G. Githinji, submitted before us that the appellant's explanation could be true although it may not be believable. It was his submission, further, that had the watchmen who were manning the two gates into the showground been called to testify, they would have probably rebutted the appellant's story. But having not been called to testify the appellant's story could well be true. Besides, he said, four spent cartridges were recovered, three from the appellant and one from the scene, but only three were examined by a ballistics examiner. The fourth cartridge was possibly one from the raider's gun.

In his evidence the appellant stated that he recovered three spent cartridges outside the police post on the material night. Stephen Ngigi, (Ngigi) an inspector of police, is one of the senior police officers who visited the scene soon after the deceased was shot. He testified that he recovered a bullet head from the scene and three empty cartridges from the appellant. He also took possession of the patchet from the appellant. Is the discrepancy fundamental? True, Benson Gichuki Nduguga (Nduguga), testified that he received and examined three spent 9mm calibre cartridge cases not four. But he also testified that he received and examined one fired and badly damaged 9mm calibre bullet. This we think is the bullet head Ngigi said he recovered at the scene. In view of that evidence there is no discrepancy. The discrepancy, if any, centres on the number of ammunition the appellant had.

Ngigi testified that the appellant's gun had a magazine with 22 rounds of 9mm calibre ammunition. The capacity of the magazine was given as 25 rounds. So if the appellant fired 4, the total would be 26 rounds. Where did the extra one come from? And, if the appellant fired only three bullets, an issue would arise as to the presence of the extra bullet.

Nduguga testified that the damaged bullet was unsuitable for comparison purposes because of its damaged condition. He was therefore not able to show whether it was fired from the appellants' gun.

The answer to the question lies in the appellant's evidence. His evidence was that he recovered the empty cartridges outside the building. Whether he recovered three, four or less is neither here nor there. The recoveries were made outside a police post where guns are used from time to time. The deceased was not shot outside the report office but at the entrance into his cell, inside the building housing the Jamhuri Police Post. As we stated earlier, it was common ground that the deceased was shot while inside the building. The bullet went through his body and exited. No evidence was adduced as to who recovered that bullet. The trial Judge took an adverse view of the appellant's conduct of picking the spent cartridges before the scene was inspected. He was perfectly entitled to take that view. But for the purposes of this appeal we wish to refer to the provisions of section 111 (1) of the Evidence Act (Cap 80, Laws of Kenya) which in pertinent part, reads as follows:-

> "111(1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him."

Nduguga's evidence was that the three empty cartridges recovered from the appellant came from his gun. Those three cartridges, as we said earlier, were, according to the appellant, recovered from outside the building of the police post. Only the appellant was present at the place where the deceased was shot. As to who shot the deceased was a fact especially within the appellant's knowledge. Only he could explain specifically where he got the three empty cartridges and why he had to pick them up when he knew very well that the scene had not been inspected. The appellant's statement does not appear to us to discharge

the burden squarely on him under section 111(1) aforesaid, of proving circumstances which would exonerate him from blame. Moreover, under cross-examination he stated that a patchet magazine carries 34 and not 25 rounds of ammunition. In view of that no issue arises as to the alleged extra bullet.

We do not lose sight of the provisions of section 111(2) of the Evidence Act which in effect provides that section 111(1) above, does not diminish the obligation on the prosecution to establish by evidence the commission of the offence charged. It is with that in mind that we now consider the decision appealed from.

The learned trial Judge held that evidence against the appellant was wholly circumstantial. He rejected a dying declaration allegedly made by the deceased on the ground that Ngigi who recorded it did not so record it in the language it was given and that it was neither signed or thumbprinted nor was there a certificate to the effect that it could not be signed or thumbprinted and reasons thereof. The learned Judge also gave other reasons which we do not consider necessary to state here because of what we are going to say hereunder.

The statement which Ngigi recorded from the deceased was made in the appellant's presence and hearing. In his evidence in chief the appellant stated as follows regarding the deceased's statement:

> "I heard evidence given in this court. I also heard the statement allegedly made by the deceased that I shot him at the back when he faced the wall. This is all lies .....,when the statement was being recorded from the deceased I was present and I was shocked with what he was telling the duty officer. I asked the deceased what he meant when he said that he had been shot by a police officer. Then the duty officer intervened and shut me up, saying that I should keep off as I had already told my side of the story."

There was no doubt that the deceased made a dying declaration. There was no doubt that he stated that he had been shot by a policeman. Whether he was shot from the front or the backside is not the issue. The issue in dying declarations is mainly the cause of death. The deceased's statement related to who had shot him. A policeman had done so, not a stranger. The appellant's statement in his defence confirmed such a statement was made. He heard it with his own ears. Consequently such a statement could not be properly rejected merely because it was not signed by the deceased, that it was not recorded in the language it was given or that it was not read back to him. All these are matters which become relevant when a question arises as to whether or not the deceased made a dying declaration. Besides, they are matters which relate to admissibility and not the weight to be attached to the statement. In our view the dying declaration was improperly ignored on the facts and circumstances of this case.

We agree with the learned trial Judge that if the dying declaration is excluded all that remains is circumstantial evidence. The learned Judge, after citing *Tumuheire v Uganda* [1967] EA 328, and *R v Kipkering Arap Koske and Another* [1949] 16 EACA, 135, among other authorities, held that to act on circumstantial evidence to support the conviction of an accused person, the evidence must point irresistibly at the accused's guilt to the exclusion of everybody else. But there is a second principle which he omitted, which is clearly enunciated in the case of *Simon Musoke v R* [1958] EA 715 and re-echoed in *Pravin Singh Dhalay v R* (Criminal Appeal No 10 of 1997) that before drawing the inference of the accused's guilt from circumstantial evidence the court must be sure that there are no other co-existing circumstances which would weaken or destroy the inference.

The learned trial Judge after carefully evaluating and assessing the evidence both from the prosecution side and the defence concluded his judgment in the following manner:

> "I am satisfied from the evidence adduced before me that the prosecution has proved its case beyond reasonable doubt, and make a finding that the accused shot the deceased."

Before he came to that conclusion he gave detailed reasons why the appellant's explanation as to who shot the deceased was not believable. Those reasons do not include the set up of the police post, and more particularly the position where the deceased was standing before he was shot. The appellant's statement

in his defence gives a graphic picture as to the location of the men's cell at the police post. This is what he said in that regard:

> "I entered into the radio room and I saw the deceased crying. It is inside the radio room that are doors leading to the cells. He was lying inside the radio room near the door to the male cells."

The above setting clearly excludes the possibility of the deceased having been shot by a person who was outside the police post. The deceased had just come out of his cell and was inside the radio room when he was shot. Had that been otherwise he would not have fallen down outside the door of the male cell. In view of that the appellant's story is totally unbelievable as the circumstances exclude any co-existing circumstances which would weaken or destroy the inference that the appellant and no other person shot the deceased. That is the more so because the appellant in his evidence exonerated Mbithi from blame. As we stated earlier there was no other person present. The appellant's is clearly a cock and bull story.

Did the appellant have the necessary malice aforethought when he shot the deceased? The learned trial Judge held that by shooting the deceased on his lower chest with a patchet gun which was loaded the appellant must have intended to kill the deceased or at least cause him grievous harm. We agree fully with that holding. The appellant's conduct on the material night, soon after the shooting, showed that he was in his right frame of mind, made up a story to exonerate himself from blame, and for sometime misled his superiors into believing that the Jamhuri Police Post might have been raided.

But the appellant and his counsel argue that essential witnesses were not called. Those they had in mind who should have been called, but were not called, are the investigating officer, arresting officer and the officer who issued the firearm he had to him. There were also the watchmen who were allegedly manning the gates into Jamhuri Showground. The law on that issue is very clear. In *Bukenya & Others v Uganda* [1972] E.A 549, the Court of Appeal for East Africa held, that where the evidence called in support of a particular charge is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution. Such inference arises because the prosecution has a duty to make available all witnesses necessary to establish the truth even if the evidence may be inconsistent with their case.

But were the witnesses the appellant is complaining about essential witnesses? With due respect to the appellant and his counsel the appellant's arrest was not an issue at his trial. He was before a Judge, was given an opportunity to be present at the hearing of his case, was represented by counsel, had an opportunity to cross-examine prosecution witnesses and to call his own, and at no time did an issue arise touching on his arrest. It would have been prudent to call the officer who issued the appellant with his weapon and rounds of ammunition and also the watchmen, but considering that the evidence against the appellant is overwhelming, this is not an appropriate case for this Court to draw an adverse inference on the failure by the prosecution to call those witnesses. As we stated earlier, the circumstantial evidence on record leaves no doubt that the appellant is the person who shot the deceased.

Before we conclude this judgment there is the first ground of appeal which, notwithstanding the conclusion we have come to above, need consideration. The appellant complains that there was variance between the particulars of the charge against him and the evidence with regard to the date of the offence. The charge states that the offence was committed on the night of 26th and 27th November, 1995. But witnesses testified that the deceased was shot on the night of 25th and 26th November, 1995. We agree that there is variance between the particulars and the evidence on that score.

The position in law is that it is not every conflict between the particulars of the charge and the evidence which will vitiate a conviction. Some of these conflicts may be of a minor nature or of such a nature that no discernible prejudice is caused on the accused. Section 382 of the Criminal Procedure Code is intended to deal with such conflicts.

We have considered the conflict pointed out by the appellant's advocate but with due respect to him, the conflict did not cause him any discernible prejudice. The appellant understood the charge he faced, he knew the person he is alleged to have shot, he cross-examined witnesses who were called to testify, and at

no time at his trial did he raise the issue of variance of dates. The trial Judge noticed the variance, and clearly had it in mind when he was considering the evidence in support of the charge. Had he appreciated any prejudice he would have said so. We do not discern any prejudice nor has the appellant brought any to our attention. In view of the foregoing it is our view that the error is curable under section 382, above.

For the foregoing reasons we dismiss the appellant's appeal in its entirety. Order accordingly.

Dated and delivered at Nairobi this 14th day of February, 2002

R.O KWACH

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JUDGE OF APPEAL

A.B SHAH

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JUDGE OF APPEAL

S.E.O BOSIRE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR