REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT KISUMU
(CORAM: CHUNGA, CJ., LAKHA & O'KUBASU, JJ.A.)
CRIMINAL APPEAL NO. 151 OF 2000
BETWEEN

JOSEPH ONGARE ONDULO .....APPELLANT

AND

REPUBLIC .....RESPONDENT

(Appeal from the conviction and sentence of the High Court of Kenya at Kisumu (Wambilyangah, J.) dated 21st July, 2000
in
H.C.CR.CASE NO. 6 OF 1994)
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JUDGMENT OF THE COURT

The appellant**, JOSEPH ONGARE ONDULO,** was convicted by the superior court (Wambilyangah, J.) of murder contrary to section 204 as read with section 203 of the Penal Code. It is alleged in the information that on 27 December, 1992 in Simur Sublocation of Ukwala Location in Siaya District of Nyanza Province, Kenya, he murdered Eunice Adipo Osela (the deceased). He was in the event sentenced to death. He now appeals to this Court against his conviction.

This was a simple case and the facts insofar as they are material may be briefly stated. The incident occurred during the morning of 27 December, 1992. The main witness to that incident was Mary Atieno Owino (MARY) (PW 2). She testified that it was around 9:00 a.m. or 10:00 a.m. when she and the deceased were sitting outside the house of the deceased and her husband Patrick Osala Ondula (PW 3) when they saw the appellant in an agitated mood return home and entered the nearby house. When he got out of it he had a panga and uttered these words: **"I must kill somebody in this house ."**. Although the two women became apprehensive and made a bid to escape, the appellant caught up with the deceased and stabbed her on the head with a knife which he had in addition to a panga and thereby caused her to fall down. On her part, she hastened to fetch the deceased's husband who was in the company of her own husband and at their uncle's home. When the two men appeared at the scene the deceased was bleeding profusely. **MARY** told the husband that it was the appellant who had assaulted his wife who died before her husband had found a vehicle to transport her to hospital. The appellant could not be traced despite efforts to do so as he had travelled to Mombasa where he arrived on 31 December, 1992. The body of the deceased was properly identified and the doctor who performed the postmortem stated that in his opinion the cause of death was cardiopulmonary arrest due to head injury caused by a penetrating wound to the head.

Before we conclude the narrative there was produced a charge and caution statement from the appellant admissibility whereof was challenged. The trial judge held a **"trial within a trial "** and at its conclusion

he ordered the statement admissible with reasons to be given later on 30 June 1997. This he never did. As stated earlier the appellant was convicted of murder.

Before this Court, the appellant raised four grounds of complaint. Entirely out of caution and lest we do any injustice to him, we set out verbatim the four grounds urged before us:-

"1.THAT the Learned Judge erred in convi cting the Appellant on the testimony of a single witness which was not corroborated in material fact.

2.THAT the Learned Judge erred in convicting the Appellant on the evidence of witnesses whose testimony was at variance as to material facts and was full of contradictions.

3.THAT the Learned Judge erred in Law and fact in admitting a repudiated statement as the same was obtained from the Appellant after physical violence on his person.

4.THAT the Learned Judge erred in failing to find that the Appellant acted on high provocation resulting from a fight between the Third and Fourth prosecution witnesses and the Appellant's brother Joseph Omondi in which the said Omondi was seriously injured.".

We shall now endeavour to deal seriatim with each of the grounds actually urged before us. First, with respect, there is no rule of law or practice which requires the testimony of a single witness to be corroborated in material fact or at all. The correct position is that a conviction may be founded upon the testimony of a single witness provided the witness was truthful. This rule of long standing was so stated by the Court of Appeal for Eastern Africa in **Abdallah Bin Wendo & Sheh Bin Mwambere v Regina 20 EACA 166** it is stated as follows:-

"Although subject to certain exceptions a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of such witness respecting the identification, especially when it is known that the conditions favouring a correct identification are difficult. In such circumstances other evidence, circumstantial or direct, pointing to guilt is needed.".

Secondly, in the present case, the learned trial judge carefully considered all the evidence before him and analysed the same in detail. Insofar as the evidence of MARY (the single witness upon whose evidence the conviction was founded) is concerned, the learned trial judge had this to say:

"I have no difficulty whatsoever in believing the eviden ce of (PW 2). It was never suggested for a moment that what she stated was untrue and a figment of imagination. She impressed me as truthful and if her evidence required corroboration then it is corroborated by the fact that the accused immediately disap peared from home and went to Mombasa where he himself lied to (PW 7) that all was well when he left home. At any rate, the defendant in his statement to Inspector Haji (PW 6) and in his defence says he assaulted the deceased because of anger after the dec eased's husband had previously assaulted him. In his cautioned statement the accused said that he assaulted the deceased with a stick but there is overwhelming evidence that the deceased who died immediately after being assaulted by him (the accused) died of a stab wound on the head. (PW 2) (i.e. MARY) said that she saw the accused stab the deceased. As to the issue of the weapon used against the deceased I also believe the evidence of (PW 2) who I repeat said that she witnessed the incident in broad day light.".

With respect, we fully agree.

Thirdly, this ground was not urged as drafted. The thrust of the complaint was that the failure to give reasons for admitting the charge and caution statement of the appellant rendered the proceedings incomplete and entitled the appellant to be acquitted. We are unable to agree. In our judgment, the failure or omission to give such reasons, in the circumstances of the present case, neither vitiated the conviction nor prejudiced the appellant. Nor did it result in any miscarriage of justice: see the judgment of this Court in **Andrew Waweru & Dedan Kioko Munyao v Republic,** Criminal Appeal No. 36 of 2001 (unreported) delivered at Nakuru on 16 November, 2001.

Finally, it was contended that the learned trial judge erred in failing to find that the appellant acted on high provocation resulting from a fight between the Third and Fourth prosecution witnesses and the appellant's brother Joseph Omondi who was severely injured. This has a reference to a fight which took place on 24 December, 1992. Because the events were not continuous and there was time for the heat of passion to cool, the learned judge expressed himself thus:

"But I must also bear in mind that fight took place on the 24th of December, 1992. Could it mean that at the time when the accused attacked the two women he was still feeling provoked by the incident of this fight with his step -brothers on the 24th of December, 1992? Provocation which affords accused person a defence to a charge of Murder is one which should not last, more than a few moments from the time when one is provoked. In this case the incident which is alleged to have provoked the accused into committing the acts of assault which caused the death of the deceased occurred two days or more tha n 55 hours before the incident of assault on the deceased.

A reasonable man is not expected to feel provoked by one incident for such a long time. In my opinion, there had been a sufficient period to enable the accused to cool down, become rational and, allow the force of law to vindicate him. .....

I find that the accused was of malice aforethought when he consciously armed himself with sharp weapons chased the defenceless and weak women and stabbed the deceased with a knife on the head. I totally refuse to believe the suggestion by the accused that the deceased on her own unreasonably became scared of the accused and that while running away she fell down and sustained fatal injuries. After all he admitted in the cautioned statement to have assaulte d the deceased.".

With all these findings, we respectfully agree.

Although simple this was a case that needed careful consideration. The learned trial judge fully directed himself on all issues. There is also the fact that both the assessors advised him to convict the appellant. After full consideration we are of the view that it would be safe to uphold the conviction. The charge was proved with that degree of certainty required by the criminal law in a capital offence.

We therefore dismiss the appeal.

Dated and delivered at Kisumu this 23rd day of November, 2001.

B. CHUNGA

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CHIEF JUSTICE

A. A. LAKHA

.....

JUDGE OF APPEAL

E. O. O'KUBASU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR