



IN THE COURT OF APPEAL

AT NAKURU

CORAM: CHUNGA, C.J, SHAH & KEIWUA JJ.A

CRIMINAL APPEAL NO. 19 OF 1999

BETWEEN

JOSEPH MULATI WAMOCHA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the conviction and judgment of the High Court of Kenya at Kitale (Lady Justice R. Nambuye) dated 18th December, 1998

in

H.C.CR.C. 3 OF 1997)

JUDGMENT OF THE COURT

On the evening of 15th March, 1995 **Alfred Simiyu Mabonga**, a nominated councillor was murdered, at Matingo Farm, in Trans-Nzoia District of the Rift Valley Province of Kenya. The history leading up to this appeal is that a 350 acre farm belonging to the late Dr. James Ouko was put up for sale by the Agricultural Finance Corporation (AFC) as Dr. Ouko did not keep up the re-payment of moneys advanced to him by AFC. We will hereafter refer to the late Mr. Mabonga, as "the deceased" the said farm could come up under an auctioneer's hammer, members of Meso Co-operative Society (MESO) had, without the knowledge and authority of AFC decided to purchase 150 acres of the said farm. Those members were actually already on to the said land when the same was advertised for sale. It was then that the members of MESO sought the assistance of the deceased so that they could purchase the farm (150 acres thereof) for themselves.

The deceased, one **Peter Makio (P.W.3.)** and nine other members of MESO proceeded to Nairobi to see the Managing Director of AFC with a view to being allowed to purchase the portion of the farm aforementioned; but nothing came of the meeting as the delegation was referred back to Kitale AFC Area Manager, who told MESO members to bid for the land at the proposed auction and **Dipsutbrliicct aCuocmtmiiiosns.ioner, Ben Mogaka**, requested the said area manager to stop the auction but the latter declined to help; however, auction sale was stopped by a court order obtained at the instance of Dr. Ouko.

The deceased kept on pressing the issue with the area manager showing him an agreement between MESO members and Dr. Ouko for the purchase of the said portion by the members of MESO. It appears that eventually it was agreed tentatively that MESO members would continue occupying the land in question and pay a sum of Shs.350,000/= as deposit and make arrangements to pay the balance of the purchase price to AFC. The balance of the 200 acres of the farm was to remain the property of the AFC. By this time the deceased had moved on to the land in question with his family. He shared the main house on the land with the family of one **Erastus Khaemba (PW8)**. The deceased was not a MESO member. He had contributed nothing.

The members of MESO eventually became disenchanted with the deceased. Allegations were made to the effect that a sum of Shs.40,000/= which the members contributed to enable the deceased to get assistance for the purchase of the land, was misappropriated by the deceased who eventually refunded Shs.18,000/= only. It was also alleged that the deceased misappropriated the proceeds of sale of MESO members' maize. It was also believed by the members that the deceased was trying to acquire for himself the rest of Dr. Ouko's farm. This disenchantment led to parting of ways between MESO members and the deceased so much so that the members wanted him out of farm. The members resorted to extra-judicial means to have the deceased and his family evicted. The wife of the deceased was allegedly threatened with dire consequences unless the deceased and the family moved out of the farm. The deceased made use of the vehicle of PW.3 to move his wife and children and a few belongings to another place in Cherangani.

On 14th March, 1995 the deceased's son collected the deceased's chicken and left with the key of the house the deceased had occupied.

On 15th March, 1995 the deceased returned to the farm, had supper with Erastus Khaemba and went to see his brother and sister-in-law one Violet M'mbone (PW.7). He asked them to give him a hammer or a metal instrument which would enable him to break open the lock on the house where the rest of his belongings were so that he could take those away. As they had no such instruments the deceased asked for a matchete (a panga) which might enable him to break open the lock.

Whilst the deceased was inside the house a crowd of people (members of Meso) collected around the house shouting that he should leave. This commotion was heard by Violet M'mbone (PW.7). She heard the voice of Mzee Richard Wanyonyi who was telling the deceased to leave the house. According to PW7 the deceased dashed out of the house through the rear door and ran towards the lower side of the farm. He was obviously pursued by a crowd of persons intent upon harming him. The words that PW.7 heard uttered were "***Nimeshika Nimeshika Kucheni (kujeni)***" that is "***I have caught him, I have caught him, please come up***". It was then that the deceased was seriously injured. PW.7 saw 4 persons dumping the body of the deceased (still alive) near the door of her house. She recognized two of those persons, that is the appellant and one Wilson Hamisi who was the third accused in the superior court. Wilson Hamisi told her that the deceased used to take pride in the fact that he had a special place in farm and that he (the deceased) ought to know he could be killed because of the farm, or words to that effect. In effect the third accused was telling her that the deceased was assaulted as he was attempting to obtain a parcel of land on the farm. The appellant came to her door and asked for her husband, PW.13.

Whilst the deceased was writhing in pain one **Anthony S/O Elijah**, the 7th accused in the superior court, hit the deceased on the head with a 'rungu'. The seventh accused told her, whilst he and others were hitting the deceased, that they did not want the deceased to remain alive. She stated that she had not earlier seen them beat the deceased. She was emphatic that the deceased was murdered by Meso members who, she said, were many. Whilst all this was going on, her husband (PW.13) asked for an Identity Card, got it, and left. He did not leave with a hoe ('Jembe'), she said.

The evidence of **No.40908 P.C Philip Chivoli (PW.9)** is of some importance. He was, at the material time, on duty at Kapchonga Police Station when PW13 came there. He had a jembe with him. He told PW9 that whilst the deceased was being chased by the crowd from the house in question he followed the group with the Jembe. He found the deceased on the ground and the appellant on top of the deceased. When the appellant tried to stand up he (PW.13) hit him with that Jembe and the appellant fell on the

deceased. PW.13 then ran with that Jembe to the Police Station when people attempted to follow him. What PW.13 told PW.9 is important as that version puts the Jembe in the possession of PW.13 when the appellant and the deceased were struggling. It must be noted that the Jembe had blood stains not on the metal part of it but on the wooden handle where it is inserted in the metal part. He is reported to have hit the appellant with the rear side of the Jembe. PW9 insisted, in re-examination, that he was the one who recovered the Jembe from PW.13. The Jembe was seen by NO.22346 **Corporal Philip Aholi (PW.11)** who confirmed that blood stain thereon were on the wooden handle.

Having evaluated the evidence of those material witnesses who testified before the superior court we come to the evidence of PW13 who was a brother of the deceased and we must approach his evidence with care. As a brother of the deceased he is an interested party and hence the need for careful evaluation of his evidence. Up to the portion of his evidence as to the deceased leaving his house with a 'panga' to try to force open the lock, after not being able to obtain a hammer or metal bar, there is and there could be no scope for dispute.

A while after the deceased left the house of PW13, he heard people shouting saying "***you Mabonga (the deceased), you pretend to be a man here -today we want your head***". He went out through the window of his house as he considered it dangerous to go through the front door. He hid in a maize plantation when he heard persons shouting saying "***Ndio huyo, ndio huyo***" that is "***he is the one, he is the one***". The voices he heard were coming from the direction of Professor Maleche's house, which was nearby. He followed the persons and he saw that the deceased whilst running away from the crowd fell whilst attempting to cross the second fence, having crossed the first fence somehow. He saw his brother (the deceased) being beaten and the appellant was on top of the deceased. He knew the appellant. He saw several persons who were belligerent and attacking the deceased. He identified seven who were the accused persons in the superior court. He stated that the first accused was lying on his brother; the second accused was kicking the deceased; the fourth accused was holding a Somali sword saying "kill"; the fifth accused was the one whose voice he had heard saying "he is the one", the sixth accused demanded the head of the deceased saying "you have troubled us for long enough to be killed"; the seventh accused was saying, "kill, kill".

Whilst the deceased was being beaten up, PW13 attempted to hold his head. He was still being beaten up. When the assailants realized he was the deceased's brother, PW.13 went away to his house and took an identity card and a Jembe from the place where he kept firewood. His wife (PW.7) had not seen him take the Jembe. With the Jembe, he said, he went to the Police Station from where he took the members of the constabulary to the scene of crime.

This witness was suspected to be one of the assailants because of the Jembe he carried and he was kept in custody for two weeks. He denied hitting the deceased with any Jembe. He said that blood-stains on the Jembe came about as a result of him having held his brother who was bleeding.

The evidence of PW13, after due warning to himself, was accepted by the learned Judge. So was the evidence of PW.7. Dealing with the evidence of PW.13 the learned Judge said:

"As regards evidence of PW13 he recognized the voices of 5th and 6th accused persons before the actual assault. After the deceased had been chased to the farm of professor Maleche PW.13 followed closely behind. He says that he saw his brother being assaulted 100 meters away. The defence counsel submitted that it was not possible for PW.13 to identify any one at 100 meters away. I agree with her, however, PW.13 said he moved closer and went and found Mulati on top of the deceased struggling with him. This is true as it was confirmed by 1st accused himself that he struggled with a person and when he flashed a torch he saw that the person he had been struggling with was the deceased. It is therefore correct that a person could recognize or identify another at close range. Further the first accused (the appellant) also says that PW.13 was at the scene and when he wanted to hit him (1st accused) with a Jembe the first accused dodged and then PW.13 hit the deceased with a Jembe".

The evidence of PW.13 did not stand by itself. It was corroborated, at least in some material particulars,

by the version of the appellant himself in his unsworn evidence. He said:

"After going for 100 paces I saw people standing near a tree. I greeted them but they did not respond. On passing, one of them cut me with a panga. He started running but he was caught up with the fence. I held him and started struggling with him. The brother came wanting to hit me but on turning he cut the brother. The brother had black clothes. I also had black clothes. The brother Isaac (PW.13) had white clothes. Isaac was away. I screamed shouting that I was being killed and people came and one of them was Wilson Hamisi (the third accused person). I took the torch and flashed and noticed that the person I had struggled with was Mabonga (the deceased). The neighbours came and said he be taken to hospital.

We removed him to where a vehicle could pick him as a vehicle could not go to where he was. He was removed to the homestead and then he died.

I went and woke up Erastus Khaemba. The wife opened for us and I explained to her what happened."

What becomes evident from what PW.13 and the appellant said in the superior court is that the two were struggling. Although the appellant says he did not hit the deceased, it is clear that the deceased was at that time already badly injured. The deceased was brought on to the MESO farm from Professor Maleche's farm.

Where the evidence of PW.13 fell at variance with the unsworn testimony of the appellant the learned Judge after considering the points of difference accepted the evidence of PW.13. What the learned Judge said in her judgment stands up to scrutiny. She said:

"If indeed the 1st accused was on top of the deceased struggling with him it means that he was facing down and he could not have seen PW.13 aiming a Jembe at him in order to dodge. His concentration was on the person he was struggling with and not the persons surrounding him. If that had been the case, there was nothing to prevent PW.13 from cutting the 1st accused from behind and there was no way the 1st accused could have escaped the attack. That version of the 1st accused is therefore discounted and the version of PW.13 as found and confirmed by PW.14 (Chief Inspector James Muthoka) that he PW.13 had gone to help his brother is acceptable and truthful."

The learned Judge accepted the explanation given by PW.13 as regards the presence of blood on the Jembe. It was PW.13 who carried it to the Police Station and if it had been used to hit the deceased it would have had blood stains on the metal part of the Jembe. PW.14 confirmed that there was no blood on the metal part of the Jembe and that he had it in his possession until such time he produced it in court.

PW.14 who investigated the killing referred to what PW.13 had told him. The consistency of what PW.13 said stood out; that was in regard to how the deceased met his death.

We cannot fault the learned Judge in her evaluation of evidence as regards how the deceased met his death. She has made exhaustive and unimpeachable findings on the conflicting evidence before her. We can only fault her for overemphasizing the issue of identification. She has written a great deal on the issue of identification of the witnesses when it was not strictly necessary. The issue turned on recognition rather than identification as the assailants were known to PW.13. They were all members of MESO and they had decided to get rid of the deceased from the farm by unlawful means. The crux of the matter is that they all had formed a common intention of getting rid of the deceased and in putting that plan into action they chased the deceased until he fell and some of them set upon him with a clear intention of injuring him. They were armed with weapons of sorts. The English case of

R.V. BETTS AND RIDLEY, 22 Cr. App. R.148 has been approved by our courts for a long time. The principle enunciated in that case is:-

"If several persons combine for an unlawful purpose or for a lawful purpose to be effected by

unlawful means and one of them in the prosecution of it kills a man it is murder in all who are present whether they actually aided or abetted or not, provided that the death was caused by the act of someone of the party in the course of his endeavours to effect the common object of the assembly."

However, the principle laid down in **R.V. BETTS AND RIDLEY** was curtailed to a certain extent in the Ugandan Case of **R.V. KIMBWI BIN MAINZA & ANOTHER** [1939] 6 E.A.C.A. 152, that is to say that it should not be applied where there exists a reasonable doubt as to whether or not the accused was, at the critical time, aiding and abetting. In the case before us there was evidence, properly accepted by the learned Judge, after due consideration, to the effect that the appellant was actually struggling with the deceased after the deceased was chased to the farm of Professor Maleche.

The common law principle of common intention is part of our Penal Code . Section 213(e) of the Penal Code provides:-

"213. A person is deemed have caused the death of another person although his act is not the immediate or the sole cause of death in any of the following cases:-

(e)If his act or omission would not have caused death unless it had been accompanied by an act or omission of the person killed or of other persons."

It was stated by this court in the case of **NJOROGE VS. REPUBLIC** [1982-88] I KAR, 142, at page 147:

"If several persons combine for an unlawful purpose and one of them in the prosecution of it kills a man it is murder in all who are present whether they actually aided or abetted or not provided that the death was caused by the act of someone of the party in the course of his endeavours to effect the common object of the assembly."

Those words are obviously taken from the decision in **R VS. BETTS AND RIDLEY** (supra). But those words stand true even in common sense parlance. The common intention of the appellant and other accused persons may be inferred from their presence at the scene of struggle.

The learned Judge however did not convict the appellant and other accused persons, that is the 3rd and 7th accused persons of murder. She convicted them of the offence of manslaughter contrary to Section 202 of the Penal Code as read with Section 204 of the said Code. She did so after concluding that it is not clear as to who delivered the fatal blow or blows on the head of the deceased. She said however, that the first, third and seventh accused persons were positively recognized to have been amongst the group. After saying that the said three accused persons were present and participated in, and approved of what they themselves and the others did to fatally assault the deceased in an effort to rid him from the farm, she found them guilty of unlawfully causing the death of the deceased.

At this juncture we would point out the three accused persons were fortunate that they were not found guilty of the offence of murder.

The upshot of this is that this appeal is dismissed.

Dated and delivered at Nairobi this 17th day of March

2000.

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CHIEF JUSTICE

CHUNGA

A.B.

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SHAH

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M.

KEIWUA

JUDGE OF APPEAL

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is

DEPUTY REGISTRAR.