



REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NYERI

CORAM: OMOLO, SHAH & BOSIRE, J.J.A

CRIMINAL APPEAL NO. 98 OF 1995

BETWEEN

SAMUEL GACHAGO NGANGA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

**(Appeal from a conviction and Judgment of the High Court of Kenya at
Nyeri (Lady Justice Ang'awa) dated 17th May, 1995**

in

H.C.CR.C. NO. 37 OF 1994)

JUDGMENT OF THE COURT

Samuel Gachago S/O Nganga (the appellant) was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The offence was allegedly committed on 5th October, 1993 at Gathiuru village in Nyeri District. The person allegedly murdered was one Stanley Mutua (the deceased).

Francis Karume Githendu (P.W.I.) was at Gathirwa. This place is part of a forest in Mount Kenya area and some persons were allowed to cultivate there. At about 5.00 p.m. on 5th October, 1993 he saw the appellant and the deceased at that place with three other persons. One of these was Nancy Kanyatta (P.W.7). He does not state who the others were. When P.W.1 sought to know the whereabouts of one Kabui Mugo from the appellant, the appellant shouted at him in anger for no apparent reason. Whilst leaving the place he stopped to look at those persons when he saw the appellant cut the deceased with a machete (panga) on the neck and the head. P.W.1 then ran away to an eating house about a 100 meters away where he allegedly met a lot of people to one of whom he narrated the incident. He then went home. He made no report of the incident to the police. In fact he only informed the police of the incident when they inquired of him. He did not volunteer the information. He became aware on 6th October, 1993 of the fact of the death of the deceased. Yet until 14th October, 1993 he made no report. He made his statement to the police on 14th October, 1993. He stated that from 5th October, 1993 he was watching developments and it was only when he heard that the appellant had been arrested that he made a statement to the police. The reason he gave for not going to the police earlier was that he was in a state of shock

since seeing the attack by the appellant on the deceased. He said he did inform another person, namely, Johanna Mbogo, of the incident on 13th October, 1993. In cross-examination he stated that the deceased received cuts on the neck. He did not refer to any injury on the head during cross-examination.

Jeremiah Mbogo Kangere (P.W.2) did not witness any assault on the deceased but he was one of the persons who found the deceased's body on 6th October, 1993. P.W.2 confirmed that the deceased had injuries on the neck and back of the head. P.W.2 took P.W.1. to the police, on 14th October, 1993.

Corporal James Mwangi (P.W.3) arrived at the scene of the assault on 5th October, 1993. He was directed there, but he did not say who so directed him. He saw that the deceased had two cuts, one at the back of the neck and another near the throat. P.W.3. went to the appellant's house during the course of his investigations and after forcibly opening the door of his house he recovered a panga, a blood-stained shirt and a pair of blood stained trousers which items were taken to the Government Chemist for analysis. He also obtained a piece of cloth allegedly taken from the person of the deceased to ascertain the deceased's blood group. The appellant's blood group was found to be of group A. The blood on the said pair of trousers was found to be of group A whereas the shirt of the appellant was found to be stained with blood group B. The piece of cloth taken from the deceased's body was found to be of blood group AB. The panga in question had no blood stains. The deceased's blood group was never ascertained. P.W.3 insisted on saying that P.W.1 informed him of the death of the deceased on 5th October, 1993.

Nancy Kanyatta (P.W.7) who was at the scene of the incident saw someone hit another person with a panga. During her examination-in-chief she said she "never recognized any of them". Yet she pointed to the appellant in the dock saying he was the one who assaulted the deceased. In her cross-examination she said that she was not sure she saw the appellant at the scene.

Kinyari Waithere (P.W.8) deposed that he met the appellant on 6th October, 1993, and the appellant told him that he had cut someone; that the cut inflicted was a minor one and that he ought not to run away. P.W.8 did nothing about what he was told, until he recorded a statement on 27th October, 1993.

The evidence of the Clinical Pathologist (whatever that term may mean) as regards the cause of death was rather cursory. She (P.W.6) who called herself a doctor recorded that the cause of death (of the person whose body she examined) was "brain injuries". She saw two deep cuts on the head with brain "oozing out". She recorded no injuries on the neck. She recorded that the deceased was clothed in blue corduroy trousers, check purple (blue & red) shirt and a dirty white jacket which was blood stained.

In her judgment the learned trial Judge made the following remarks concerning P.W.6's evidence.

"Further a post-mortem examination was carried out by P.W.6. a medical doctor - (Clinical Pathologist). From her examination it (sic) most clear that the body examined did not belong to the deceased. This is noted from the clothes the deceased wore. The post-mortem report states that the deceased wore a blue corduroy trouser checked purple blue and red shirt, dirty white jacket blood stained. The clothes taken to Government Chemist was (sic) a Brown pair of long trousers, a grey/blue/white checked short sleeved shirt----- . What was clear is that the doctor definitely examined the wrong body."

From this passage, it is clear that the trial Judge found as a fact that the body on which P.W.6 carried the post-mortem examination was not that of the deceased. Clearly, there was a substantial doubt as to what injuries the deceased died of and whether those injuries were the ones alleged to have been inflicted by the appellant.

We have set out the relevant facts as deposed to by various material witnesses. The evidence of P.W.7 is of no help at all to the prosecution. She was unable to identify, properly, or at all, the assailant. The evidence of P.W.1 connects the appellant to the assault on the deceased by a panga. But he waited for some nine (9) days before making a statement to the police and that was only when he was called upon to make the statement. The delay in reporting the matter to the relevant authorities must cast some doubt on his credibility. The reason he gave for such delay was that he was in a state of shock; yet he was able to

inform some person (the proprietor of the eating house about 100 meters away from the scene) of the incident immediately after the event. The prosecution did not even find it necessary to call the proprietor of the eating-house to lend credence to the evidence of P.W.1.

Counsel for the Republic relied on the evidence of P.W.1, P.W.7 and P.W.8, to support the conviction. We have already pointed out the difficulties the court could face in convicting on the evidence of P.W.1 alone. Evidence of P.W.7 does not connect the appellant with the assault. The evidence of PW8 falls short of pointing a finger exclusively at the appellant as being the assailant of the deceased.

The presumption of innocence is the cornerstone of our criminal justice system. If a court of law has to strain itself to arrive at a finding of guilt the obvious inference is that there are some lurking doubts in the mind of the court. Such doubts must, of course, be resolved in favour of the accused person. Further doubt is thrown on the prosecution case by lack or absence of the deceased's blood group. The deceased's blood could have been examined for grouping. We do not know why this was not done.

Finally, there is a doubt as to whether or not the learned Judge summed up the case to the assessors. There is no record of the summing up notes. The record only shows the remark by the learned Judge, that is to say "Summing-up before the court". It is likely the Judge did not sum-up the case to the assessors. For the foregoing reasons, the appellant's appeal has merit and accordingly, we allow the appeal, quash the conviction and set aside the sentence. We order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Nyeri this 26th day of October, 2000.

R.S.C. OMOLO

JUDGE OF APPEAL

A.B. SHAH

JUDGE OF APPEAL

S.E.O. BOSIRE

JUDGE OF APPEAL

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

DEPUTY REGISTRAR