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| Case Number: | Criminal Appeal 154 of 2006 |
| Date Delivered: | 27 Oct 2006 |
| Case Class: | Criminal |
| Court: | Court of Appeal at Nyeri |
| Case Action: | Judgment |
| Judge: | Philip Kiptoo Tunoi, Emmanuel Okello O'Kubasu, John walter Onyango Otieno |
| Citation: | John Wanjohi Magoci v Republic [2006] eKLR |
| Advocates: | Mr. Muchiri for the Appellant |
| Case Summary: | Criminal law - murder - appeal against conviction and sentence of death - re-evaluation of the evidence - contradictions in the evidence of the prosecution - whether the contradictions were material - whether the charge had been proved against the appellant - Penal Code sections 203, 204 |
| Court Division: | Criminal |
| History Magistrates: | - |
| County: | - |
| Docket Number: | - |
| History Docket Number: | H.C. Cr. Case No. 16 of 2004 |
| Case Outcome: | Appeal dismissed |
| History County: | - |
| Representation By Advocates: | One party or some parties represented |
| Advocates For: | - |
| Advocates Against: | - |
| Sum Awarded: | - |

**IN THE COURT OF APPEAL OF KENYA**
**AT NYERI**

**CRIMINAL APPEAL 154 OF 2006**

**JOHN WANJOHI MAGOCI …… APPELLANT**

**AND**

**REPUBLIC …… RESPONDENT**

**(Appeal from a conviction and sentence of the High Court of Kenya at Nyeri (Khamoni, J) dated 25th February, 2005**

**in**

**H.C. Cr. Case No. 16 of 2004)**

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**JUDGMENT OF THE COURT**

The appellant, **John Wanjohi Magoci**, faced a charge of murder contrary to **section 203** as read with **section 204** of the Penal Code in that on 11th January, 2004 at Mutitu village in Kirinyaga District within the Central Province, he murdered Ciithirina Wanjiru Magoci. He pleaded not guilty to the charge but after full hearing, the superior court (Khamoni, J), found him guilty, convicted him of the offence as charged and sentenced him to death. He was not satisfied with both the conviction and sentence and filed this appeal in which he listed, on his own, six main grounds of appeal. His learned counsel, Mr. Muchiri, however filed and argued three supplementary grounds of appeal which were:-

**"1. The learned trial Judge erred in law and in fact in finding that the prosecution had proved beyond reasonable doubt that the accused person murdered the deceased.**

**2. The learned trial Judge erred in law and in fact in failing to find that the evidence adduced by the prosecution witnesses was contradictory and therefore not safe to convict on.**

**3. The learned trial Judge erred in law and in fact in dismissing the appellant's defence and failing to find that the appellant's alibi had not been dislodged."**

The facts of the case that was before the superior court can be given in a brief.

The deceased, Ciithirina Wanjiru Magoci, was the mother of the appellant. On 11th January, 2004, Paul Muthii (PW 2) (Muthii), a child of 12 years and a younger brother to the appellant, was at their home at about 10.30 p.m. He heard noise and on checking, he found his brother who was better known to him as Cubi quarrelling with their mother (the deceased). The appellant's mother was inside her house. The appellant hit the door and it opened. The appellant got into the house and cut their mother with a panga on her head, having told the mother to either sub-divide her property or he would kill her. Their mother told the appellant to kill her if he wanted to do so. Muthii was shocked and he ran into a coffee

plantation. On his return after about five minutes, he found the deceased lying down while the appellant had disappeared. The deceased was not responding to his calls. Muthii reported the incident to other people and eventually a report was made to the police. Muthii did admit to the court in cross-examination that the evidence in chief was to some extent different from what he told the police but he insisted that he was present and was about 10 metres when his mother was killed by his brother, the appellant. Robert Muriithi (PW 3) (Muriithi) was another child aged 14 years old. He was a grandson of the deceased. On 11th January, 2004 at night, he was at home sleeping when he heard noise from the appellant's house. He also called the appellant Cubi. He saw the appellant being held by Mama Rose (most probably Tabitha Wanjiku (PW 5)) and was being pulled by the same Mama Rose towards the road. The appellant released himself from the grip of Mama Rose and ran back and hit the deceased's door. When he got inside, he told the deceased to sub-divide her property. He thereafter cut the deceased with a panga on her face. They then ran away. She was able to witness all that through the light of a tin lamp. Muriithi and Muthii went to Mama Wahinya and to Mama Sammy and woke them up. Thereafter the appellant disappeared but a report was made to the police. This witness's evidence in court, also did to an extent differ from what he told the police but not on material aspects. Pascarina Muthoni (PW 4) (Muthoni) was the appellant's neighbour and the appellant's sister-in-law. She also called the appellant by his nick name – Cubi. On 11th January, 2004, a few minutes to the incident, the appellant went to her house and asked for her husband. Her husband was not at home at that time and the appellant left her home but after the appellant went away to his home, she heard children crying. She also heard the appellant telling the deceased to go back or else she would be killed. Muthoni went to the deceased's house and found her washing her feet. The appellant was there. Muthoni held the appellant's hand and pulled him a distance away. The appellant at that time had a panga. He (the appellant) released himself from Muthoni's hand and ran back to the deceased house, hit the door, got into the house and cut the deceased on the face. Muthoni went for assistance but on her way she heard children screaming and telling Mama Rose that their grandmother had been killed. She came back with others, found the appellant standing at a corner but thereafter the appellant went away with the panga which was later found in a river. They went to the police, reported the incident and returned with the police officers to the scene. The body of the deceased was later taken to Kerugoya Hospital Mortuary.

Tabitha Wanjiku Muthoni (PW 5) was with Pascarina Muthoni (PW 4) and witnessed the incident upto the time when the appellant released himself from the hand of Muthoni and ran back to the deceased's house. She assisted Muthoni in pulling the appellant to the road. She did not follow him as she thought the appellant was going to kill the deceased. She heard the deceased pleading that she was going to be killed and thereafter heard people screaming that the appellant had killed the deceased. She was nearby and stayed with the children that night as Muthoni and others went to report to the police. Geoffrey Wachira (PW 6) confirmed that Muthii and Muriithi reported to him that night that the deceased had been killed. He, together with other women, went to the Chief's camp and got three APs including APc Michael Wachira (PW 8) with whom they went to the scene. After APc Michael went to the scene and searched the surrounding area for the appellant in vain, they went to Baricho Police Station and reported the matter to the OCS who directed other officers including Pc J. Muli (PW 10) to go to the scene of the incident. Pc Muli found the body of the deceased in a pool of blood. It had several cuts some of which were one big cut on the back and the head; one cut on the left side of her face, one cut on the left side of the abdomen and another cut on the left arm. They removed the body to Kerugoya Hospital Mortuary where the post mortem was conducted. At that time, the murder weapon could not be traced but later on 12th January, 2004, Francis Gachagua Magoci (PW 7) recovered two pangas in a river and took them to the police. The same pangas were produced as exhibits in court. Pc Mulu told the court that the appellant surrendered himself to the police at Kerugoya Police Station and was arrested and taken to Nyeri Provincial General Hospital for examination as to whether he was fit to stand trial. Dr. Mwangi of Nyeri Provincial General Hospital examined him on 5th February, 2004 and in a report (Exh. 1) produced by Dr. Grace Gitonga (PW 1), the appellant was certified fit to stand trial. Dr.

Paul Mbalu (PW 11) performed a post-mortem on the deceased's body on 19th January, 2004 and formed the opinion that the cause of death was acute Haemorrage and spinal shock due to multiple cuts inflicted with sharp object. After hearing the evidence in chief, the superior court found that there was a case to answer and the appellant was put to his defence. His defence was that on 4th January, 2004 he went to the quarry where he was working and stayed there till 15th January, 2004. When he went back home, his houses were locked and no one was at home. He heard people singing at the deceased's house and he decided to go and check whether his wife was there but he was met by a mob armed with stones. He did not know what was going on and so he escaped to the police station to save himself. It was at the police station where he was told that he had killed his mother. In a nutshell, he raised an *alibi* as his defence.

The above is what, according to the record before us, was the entire evidence adduced before the trial court. After a short summing up to the assessors, their unanimous verdict was that the appellant was guilty of murder. The learned Judge after what we think was a careful consideration but in a short concise judgment, found the appellant guilty and, in convicting him had this to say:

**"But evidence is clear that the accused in attacking the deceased, used a sharp object. He was seen and heard attacking the deceased and his attempt to explain away that killing does not convince me. His intention to kill is manifested in his uttered words at the time of his violence and in the severity and intensity of the injuries inflicted upon the deceased.**

**I am satisfied the prosecution has proved beyond reasonable doubt that it was the accused person who murdered the deceased."**

Before us, Mr. Muchiri in his address to us contended that the conviction could not stand as there were so many contradictions and discrepancies in the prosecution's evidence as to amount to the identity of the appellant as the attacker not being proved beyond reasonable doubt and that the same contradictions gave allowance to the defence of alibi raised by the appellant being believable and that being the case, the appellant was entitled to the benefit of doubt and thus to an acquittal.

This is a first appeal and we are duty bound to analyze and evaluate the evidence on record afresh and after doing so, to come to our own independent conclusion but always putting in mind that the trial court had the advantage of hearing and seeing the witnesses and their demeanour and giving allowance for the same. (See the case of **Okeno vs. Republic (1972) EA 32)**. That the deceased met her death as a result of the serious injuries inflicted on her on the night of 11th January, 2004 does not appear to be in dispute. There is a post mortem report on the same which lists several cuts on her body and ends in the undisputed medical opinion that the deceased died as a result of acute haemorrage and spinal shock due to multiple cuts inflicted with a sharp weapon. Who inflicted those injuries upon the deceased on 11th January, 2004 at night" The appellant said he was not there as he left home on 4th January, 2004 and was not back till 15th January, 2004 long after the incident. Against that defence of *alibi*, Muthii, his brother, Muriithi, his nephew, Pascarina Muthoni, his sister-in-law and Tabitha Wanjiku Muthoni, his immediate neighbour, all saw the appellant at the scene. Muthii, Muriithi and Pascarina Muthoni all witnessed the appellant harking the deceased to grisly death. Tabitha Wanjiku Muthoni who helped Pascarina Muthoni in pulling the appellant to the road saw the appellant break lose from Pascarina's hands; saw him run back to his mother's house with a panga in his hands; gave up the attempt to promote peace as she knew the appellant was going to kill the deceased. It is not in dispute that the killing took place at night and that the night was dark and only a small tin lamp was in the house where the murder took place. However, in our mind, the contradictions that were detected in the evidence of the prosecution witnesses, particularly as to where each witness was at the time of the incident (as we do agree there were contradictions), were not material and did not go to the core of the entire case. We

are also in agreement with the learned trial Judge when he said:

**"In that defence, the accused person is trying to say that he was not at his home on 11th January, 2004 the date the offence on this case was committed. But there is overwhelming evidence that he was there. The offence was committed at night and there is evidence that the night was dark. But those who were with the accused that night were not with him in any hurried manner. They were with him as a member of their family with them at home talking, moving from place to place, from house to house where light must have been and doing things together as they heard and saw each other in recognition of each other's presence. When the accused person was talking they recognized him, when acted (sic), they recognized him. PW 2, PW 3, PW 4 and PW 5. As the accused person quarreled with the deceased all those witnesses were hearing and seeing him and when PW 4 and PW 5 held the accused person pulling him out of and away from the house of the deceased which had a tin lamp, there was no mistake about it. He was seen armed with a panga."**

We may add that Muthii and Muriithi reported the incident immediately to other people and that was an added evidence of consistency of their evidence as a whole. There was also motive, if one was required, in their evidence of what the appellant told the deceased immediately before harking her with a panga which was that she had to either agree to subdivide the property or face death. Further, the conduct of the appellant in running away from home and eventually surrendering himself to the police, all lend assurance to his having been there and the defence of alibi was, in our mind, clearly dislodged.

In our view, having carefully and anxiously considered the various contradictions in the evidence, we are of the view, as the learned Judge, that the totality of the evidence that was adduced in the case plus the fact that the same evidence was adduced mainly by immediate relatives and immediate neighbours, left no doubt whatsoever that the deceased met her cruel death at the hands of her son, the appellant, and that the appellant inflicted the injuries causing death with intention of causing her death or causing her grievous harm and the motive was that the deceased declined to subdivide her property for the appellant.

The result is that we do agree with the superior court and as such, this appeal fails. It is dismissed. Judgment accordingly.

**Dated and delivered at Nyeri this 27th day of October, 2006.**

**P.K. TUNOI**

**……**

**JUDGE OF APPEAL**

**E.O. O'KUBASU**

**……**

**JUDGE OF APPEAL**

**J.W. ONYANGO OTIENO**

**……**

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**