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Court:	High Court at Malindi
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Judge:	Hellen Amolo Omondi
Citation:	SULUBU KAZUNGU BAYA v REPUBLIC [2009] eKLR
Advocates:	-
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**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI Criminal Appeal 4 of 2007**

**SULUBU KAZUNGU BAYA ..... APPELLANT**

**- Versus -**

**REPUBLIC..... RESPONDENT**

**J U D G M E N T**

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Sulubu Kazungu Baya (referred to as the appellant) was convicted on a charge of manslaughter contrary to section 202 Penal Code as read with 205 Penal code and sentenced to 15 years imprisonment.

He had denied the charge whose particulars were that on 12<sup>th</sup> August 2004 at about 9.00pm at Mkoma Moja village, Kipini location within Tana River District of the Coast Province unlawfully killed Sulubu Karisa. After due trial in which prosecution called seven witnesses and appellant was the only defence witness, he was convicted.

Appellant was the father of the accused and husband to PW1 (Bugato Bahaya Komora) on 12-8-04 at about 9.00pm appellant had spread his mat and was smoking bhang inside the house when the deceased walked into the room – sensed the smell of the weed and walked out. After a brief conversation with his mother (ie PW1), the deceased left to go for a short call. Appellant went where the deceased was and stabbed him – deceased fell down saying “umenidunga, umeniua” (you have stabbed me, you have killed me). PW1 rushed to the deceased and noted he had been stabbed on the chest and blood was coming out of his chest. She did not see the knife appellant used as it was dark although she had seen him with a knife that morning and which she was able to identify in court.

PW1 stated that the knife was recovered from the *makuti* structure where appellant had thrown it after stabbing deceased.

PW1 then called one of her sons, Kalume to get a bicycle - a neighbour Mwambegu heard the noise and went to the scene. It was her evidence that appellant was a bhang smoker and would become violent once he had consumed the same. After the incident, PW1 run to the local church, but appellant ordered her to go back and bury the deceased. Appellant then went to report that deceased had stabbed himself, but when police arrived at the scene PW1 told them it was appellant who had stabbed the deceased. She identified part of the bloodied cloth which had been worn by appellant and had been produced as exhibit.

PW1 also stated:-

***“Accused kept saying everyday that he would kill someone with his knife. I kept reporting to the village elder ....accused is a son to the brother of the village elder and that is why he took no action.”***

PW1 on cross-examination denied suggestions that deceased was stabbed by one Salim, saying;

***“It is you who stabbed him. We were only 3 of us with you and deceased. It was not Salim. Salim was at the road. It is even me who held you on the shoulder to remove you....”***

Kalume Sulubu (PW2), a brother to the deceased told the trial court that he was at home on 2-8-04 at about 9.00pm when a fight erupted between he deceased and the appellant over a pair of trousers which deceased as wearing. Both the deceased and appellant were drunk. Then he said:

***“The accused (now appellant) left where he had been drinking and came to the deceased. He stabbed the deceased with a knife. I saw him stab the deceased and deceased screamed “Baba umeniua 3 times. I do not know where he got the knife from...I saw he had been stabbed on the right side of the chest.”***

PW2 further informed the trial court that after he incident, appellant suggested to his wife (PW1) that they go to the police station and say that deceased had stabbed himself – she declined. Accused’s other brother followed the appellant and realized he had reported to the village elder that it was Salim who had killed the deceased, and at the police station he said deceased had stabbed himself. PW2 and their neighbour Mwambegu collected the knife, about 3 metres away from the scene. PW2 also identified a blood stained shirt deceased had worn. He said “before the fight, the deceased did not exchange any words with the accused. Accused did not speak at all. He just rose and attacked the deceased.”

On cross-examination PW2 was insistent that it was the appellant who stabbed the deceased and deceased even made such a declaration thrice before he succumbed further that even before the date of the incident, appellant had been threatening the deceased.

Salim Sulubu (PW3) was at the home of a neighbour called Njoroge when he heard voices coming from his home which was about 300 metres away – this was at about 8.30pm. He rushed home and found the deceased inside the house, already dead with a knife wound on the right side of his chest. Kalume (PW2) told him it's their father who had stabbed deceased after some disagreement over alcohol. He was present when his father reported to the village elder that deceased had stabbed himself but that his mother disagreed and told the village elder that it was not true. When they went to the police station, appellant repeated he same lie, and again his mother said it wasn't true.

On cross-examination PW3 said he had left the deceased and the appellant drinking alcohol, and when he returned, PW1 was already dead. He denied suggestions by appellant that he is the one who killed he deceased, saing he had no reason to do so as there existed no differences between them.

Mwambegu Dadi, a neighbour to the Sulubu family heard sounds of people quarreling in his neighbour's home which was 50 metres away. He could not hear what they were saying, then he heard someone say three times, "*umeniua*" he also heard the voice of PW1 asking for water, and calling for help. When he got to the home to find out what was happening, he found the appellant, his wife and three sons (Salim, Shida and Kalume). The deceased was seated, being held by his mother who suggested that he be taken to hospital – however PW4 held him and realized he was already dead. PW4 noticed that deceased had a wound in the right side of the chest and on inquiry, PW1 and PW2 said appellant and deceased had been fighting – which appellant confirmed, but appellant claimed it was PW2 who had stabbed the deceased – Kalume who was present denied that Pc Michael Onchiri (PW5) who received the report from appellant told the trial court that appellant's report was that his son had stabbed himself with a knife. He visited the home and was given the knife which was the murder weapon and he deceased's shirt. Appellant's wife informed police that it was appellant who had stabbed the deceased.

(PW6) Dr. Charles Mwangombe who examined the appellant found him to be mentally fit.

Dr. Arnold Ojengo (PW7) performed the postmortem on the deceased stated that there was a chest injury on the anterior chest wall on the right side. He formed the opinion that the cause of injury was a penetrating chest injury.

In his unsworn evidence, appellant told the trial magistrate that his son had quarreled in his house in April 2002 and the deceased was stabbed by his younger brother, Salim. Later on in August 2002, the deceased and Salim quarreled again, and Salim again stabbed the deceased: then Salim and his mother tried to escape into the *shamba* while appellant remained screaming, with the deceased lying down.

When the neighbours came, appellant left to go and look for Salim and even met some people who told him that they had met the two running away, so he made a report to the village elder. The next day, police came, called his wife aside and spoke to her then appellant was arrested. He insisted he did not kill deceased whom he loved as he (deceased) used to help her and maintained that it is Salim who must have killed the deceased out of jealousy, as they had in the past fought for about 5-6 times.

The trial magistrate in his judgment found the evidence of PW1 and PW2 to be corroborative in every detail. He considered the evidence of witnesses as regards who was at the scene and that the person so consistently mentioned were PW1, appellant and the deceased, and that since none of these witnesses implicated PW1 in the incident, then the appellant was the most likely to be involved.

Trial magistrate also noted that there was corroborated evidence of a quarrel and a fight between appellant and deceased and also evidence of identification of the knife used in the attack, having belonged to appellant and its recovery a few metres from the scene.

The trial magistrate noted that there was a foundation on the motive of the attack being that appellant and deceased were both drunk and appellant had even ordered deceased to remove a pair of trousers deceased wore.

The trial magistrate also took into account that initially appellant reported that deceased was stabbed by PW2 (Kalume) only to change that later to Salim being the culprit and he stated:

***“All these factors can only lead to one conclusion, that it was accused, and not someone else, who stabbed deceased to death... the cause of death of deceased to be as a result of the penetrating chest injury, which to me is consistent with a knife, as in this case...”***

The appellant's defence was considered and rejected, trial magistrate noted that appellant did not state what could have been the cause of the fight between Salim and accused.

Appellant challenged the findings on grounds that:

- (a) the trial magistrate erred by convicting him without considering that there existed a grudge between him and his wife.
- (b) There as no proper investigation done
- (c) He was framed up.

The appellant filed written submissions stating that the charge was based on petty domestic grudge between him and his wife who is also the source of her rebellious sons. He argues that this is borne out by the fact that whereas PW1 says they were only three of them at the time, PW2 claimed he was at home together with one Shida. He urges the court to resolve this contradiction in his favour, submitting that contradicting evidence is not reliable. He refers to the case of **Agostino Njoroge Ritho v R cr. App. No. 99/86**. Appellant draws the court's attention to the evidence that a prelude to the killing did not stem from any grudge or quarrel since evidence is that he just got up and walked to deceased and stabbed him – which to his mind is not possible and that the evidence against him as simply a conspiracy amongst his rebel family members.

As regards the offending weapon, he urges this court to consider the evidence of PW1 to the effect that she did not actually see the appellant with the knife at the time of attack and appellant wonders how he could have had the knife from morning till evening and questions how a kitchen knife can specifically belong to the father and not the family, especially because it was not found in his actual possession. He argues that these suggest that the witnesses are not very straightforward persons. It is contention that the conduct of his wife (PW1) and son Salim (PW4) suggest a guilty mind because immediately after it was pronounced dead, they both left the scene and that the truth is that they were running away from the scene because of being involved in the death of the deceased and that he is being framed.

He lists witnesses who were not called as Liwali Salim (the headman) Shoda/Shida, (a village elder) Njoroge (the complainant's neighbour), Mama Rabel, Cpl. Jared Nyaosi, Frank Mbaji and Menyi Kikugu and that the failure to call these witnesses shows the trial magistrate deliberately failed to address the issue out of malice.

He cites the decision in **Bukenya & Others v Uganda** which held that

- 1) prosecution must make available all witnesses to establish truth even if their evidence may be inconsistent
- 2) when the evidence is barely adequate, the court may infer that the evidence of the uncalled witnesses, if called would tend to be adverse to the prosecution.

As for the recovered purported weapon appellant submits that there was nothing to prove its usage and no evidence of any blood stains found on the knife. Further that, no investigation was carried out.

The appeal on conviction and sentence was opposed and Mr. Ogoti on behalf of the State urge the court to consider the evidence of PW1 especially regarding appellant's violent nature whenever he became inebriated on bhang and alcohol, and he kept saying he would kill someone with a knife. He points out that this evidence was supported by the evidence of PW2 whose evidence confirms the altercation between appellant and the deceased, further that the evidence placed the appellant at the scene.

Mr. Ogoti concedes that there are contradictions in the evidence as to what preceded the stabbing because whereas PW1 said there was no altercation, PW2 said there was an altercation. However both confirmed that appellant and deceased were drunk and that what is clear that appellant stabbed the deceased, thus making the contradictions in the evidence minor.

Mr. Ogoti further submits that the evidence did not establish any existing grudge between appellant and PW1 and that investigations were properly carried out. He points out that considering the sequence of events, its only the appellant and deceased who fought and deceased was stabbed, the only conclusion is that the appellant was the culprit.

As for the witnesses who were not called, Mr. Ogoti submits that it was not demonstrated how failure to call the named witnesses resulted in appellant being prejudiced.

The evidence on record merely discloses that the appellant and PW1 had separated and PW1 had even moved out to live on her own piece of land, leaving the appellant with the children. However the children all followed her,

and as at the time of the incident, it is the appellant who had moved to join PW1. If there existed a grudge between him and PW1, this is not demonstrated by the evidence on record, and indeed the learned trial magistrate had duly considered this suggestion by the appellant and correctly drawn the conclusion that the existence of a grudge was not proved. I found no reason to fault the trial magistrate on this. It is true that there is discrepancy on the prosecution witnesses evidence as to what preceded the deceased's demise and how many people were present. Whereas PW1 told the trial magistrate that there were only three of them, and appellant did not say anything before stabbing the deceased, PW3 Kalume said he was present and witnessed the deceased and appellant quarrel over a pair of trousers which the deceased was wearing before deceased got up and stabbed the deceased.

In this discrepancy fatal to the prosecution case" I think not because the material issue was – how did the deceased meet his death – and on this both PW1 and PW2 are agreed, that appellant got up from where he was sitting and went up to the deceased, the next thing was deceased's declaration "*you have stabbed me, you have killed me*" followed by a fall, and a gush in his chest, bleeding, and he expired. Surely what other explanation could there be – whether there were only three of them at the scene or four of them, the chain of events is such that the only person who was close enough to inflict anything on the deceased at that precise moment, was the appellant and no one else. I agree that the evidence did not prove that the kitchen knife recovered three metres away from the scene was definitely the one which was used to inflict the injury as there was no evidence to show that the said knife when recovered had any blood stains, or if it had blood stains, was taken to the government analyst for examination to confirm that the blood on it was human blood and belonged to the deceased. Yet none recovery of the weapon used to inflict the injury, would not necessarily rule out the fact that deceased was stabbed – it may only suggest that perhaps appellant got rid of the weapon he used. This issue of a stab wound is confirmed by the evidence of all the prosecution witnesses who immediately observed the deceased and indeed saw that he had a stab wound, was bleeding from the chest, the blood stained shirt, and the postmortem report which found the cause of death to be a penetrating chest injury and of course deceased's own utterances.

There was no evidence to suggest that the injury may have been caused by anything else other than an object that appellant used when he got near the deceased, and which caused that penetration.

There are witnesses named who were not called – did such occasion prejudice to the appellant"

Liwali Salim (the headman) was mentioned as the one appellant went to make a report to, that his son Kalume had killed the deceased, Njoroge was the neighbour at those house Salim had been at the time he incident took place, Shida appellant's son (who was not present and is only mentioned in the context of the deceased), Mwambegu, a neighbour who arrived at the scene AFTER deceased had already been stabbed and was dead –

and he testified

The role of each of these named witnesses is clear and the failure could not, in any considered view be prejudicial to the prosecution case and the case of **Bukenya** does not apply. Having addressed all these issues I find that the conviction was safe and I uphold it. Mr. Ogoti conceded that for a first offender, the 15 years sentence was rather harsh. Taking into account the circumstances of the case, both were drunk and the relationship between the appellant and the deceased, I find it prudent to interfere with the sentence and reduce the same to five years.

Consequently the 15 year sentence is set aside and substituted with 5 (five) years imprisonment which takes effect from date of judgment.

Delivered and dated his **16<sup>th</sup>** day **of December 2009** at Malindi.

**H. A. OMONDI**

**JUDGE**



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