



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUNGOMA.

CRIMINAL CASE NO. 25 OF 2017.

REPUBLIC.....PROSECUTOR

VERSUS.

BRIAN KIPSANG KAPKOMU.....ACCUSED

JUDGMENT.

The Accused Brian KIPSANG KAPKOMU is charged with offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence being; On the 18th day of July, 2017 in Mt. Elgon Sub-County within Bungoma County murdered EK.

Pw1 AC aged 18 years old testified that the Accused Brian Kipsang Kapkomu cheated her and they had sex where upon she became pregnant and gave birth to the deceased EK in June 2017. They were not staying together. On 18.7.2017 A was a sleep at her parents home in the Kitchen house with her brothers and sisters. She was sleeping on the floor with the deceased E who was about 3 months old. While so asleep, the accused came and opened the door using an iron bar. He entered the house removed the blanket they were covering themselves with and hit the child with an Iron rod on the face. She screamed and accused ran out. All this time he did not talk. Her mother upon hearing the screams came and they informed the assistant chief. The child died that night. She stated that the accused had denied that the child was his. On being Cross-examined by Anwar for the accused she stated that there was moonlight and that where had been arrangements for accuseds mother to bring gift to the child.

Pw2 PC a minor aged 14 years was with A (Pw1) asleep. She was sleeping nearer the door she heard a person enter the house. He then removed the blanket they were covering themselves with and hit the child with an Iron bar. They screamed and he escaped. On being Cross-examined she testified that the door is made of wood and they bolted it using nails. She testified that accused had a torch and A Pw1 also had a torch.

Pw3 LK a minor aged 10 years was also asleep with A (Pw1) and P (Pw2) when accused pushed open the door and came in. He then hit A (Pw1) and the deceased with an Iron rod. They screamed and he escaped.

Pw4 SKC the mother of A (Pw1) responded to the screams by A and ran to the Kitchen house where they were. They informed her that accused had come hit the child and had escaped. When she opened the door, she had seen accused running away into maize farm, she testified that accused had impregnated A who gave birth to the deceased but he had denied paternity.

Pw5 Dr. Eli Kosgei performed a Post Mortem on the body of the deceased and found he had abrasion marks on right side of the head; fracture on right side of head with massive bleeding into the brain. He formed opinion that cause of death was due to shock as a result of injury to the head.

The accused gave sworn evidence in his defence. He testified that on 17.7.2017 the date of the offence was alleged to have been committed, he was at his uncle's home at Sejembe in Masindet. He had gone there on 16.7.2017 and left on 19.7.2017. He testified that A(Pw1) was his girlfriend with whom they had a child. He had gone to Iten for training until when he was arrested.

The accused called Dw2 Silas Chesebe his uncle who testified that accused stayed with him from 16.7.2017 until 19.3.2017 when he escorted him to Kimilili and he boarded a vehicle to Iten for athletics training. He testified that on the material night of the offence, he was asleep with accused in the same house.

Mr. Anwar Counsel for the accused filed written submissions. He submitted that it is not in dispute that EK was killed on 18.7.2017 at about 2a.m. He submitted that the main issue for determination is whether the prosecution has established that it is accused who murdered the deceased. He submitted that he prosecution has sought to rely on the evidence of recognition of the accused and that this court should treat that evidence with caution. He invited the court to be guided by the principles on recognition enunciated in *Wamungo -Vs- Republic 1989 eKLR 424*. Counsel further submitted that the evidence of the witnesses that accused flashed a bright torch at them means they would not be able to see him as he was holding the torch.

Mr. Anwar further submitted that the Accuseds alibi defence was corroborated by the evidence of Dw2 Silas Chesebe and that this evidence was not shaken by the prosecution. He submitted correctly in my view that where an accused raises an alibi defence, the burden of proof does not shift to him but remains on the prosecution.

That the deceased died on the material night is not in dispute. Indeed the witnesses positively testified to this fact. The evidence of Dr. Eli Kosgei 9Pw5) confirms that the deceased died due to massive bleeding to the brain as a result of a fracture on the right side of the head. The prosecution in order to succeed on a charge of Murder must prove that the accused is the person who inflicted the injuries from which the deceased died. In this case A (Pw1) testified that she was asleep with her siblings and the deceased child on the floor of their house when accused pushed the door open, removed the blanket they were covering themselves with, hit the deceased who was sleeping with her and upon her screaming, he escaped. This is same evidence P (Pw2) and L (Pw3) who were all in the same house. A in her evidence testified that the accused all this time did not speak and that the only way she was able to identify him was for visual recognition. She testified that she was able to do so using the light from the torch he used.

The evidence against the accused therefore rests on the issue of identification In **Wamunga -Vs- Republic** the court of Appeal stated;

“It is trite law that where the only evidence against a defendant is the evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.”

The court further stated that evidence of visual identification in Criminal cases can bring about a miscarriage of Justice and it is of vital importance that such evidence is examined carefully to minimize the danger. Where the case against the defendant depends wholly or to a great extent on the correctness of the identification of the accused which he alleges to be mistaken the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of identification.

What was the circumstances of identification in this case? There is evidence that the incident occurred at night; in-fact 2a.m. in the morning. The witnesses and deceased were asleep on the floor of the Kitchen house. The prosecution witnesses testified that the door was forcefully opened. A person entered into the house flashing a torch, removed the blanket covering them, identified the deceased, hit him and left. He did not speak all this time. The person did not speak and therefore there was no voice recognition. The reliance therefore was on visual identification.

In evaluating the correctness and accuracy of visual identification the court should consider whether there existed factors favouring positive identification. The factors would include;

- 1) *What were the lighting conditions under which the witness made his identification.*
- 2) *What was the distance between the witness and the perpetrator.*
- 3) *Did the witness have an obstruction view of the perpetrator.*
- 4) *Did the witness have an opportunity to see and remember the facial featuring body size, hair, skin colour and clothing of the perpetrator.*
- 5) *For what period of time did the witness actually observe the perpetrator.*
- 6) *During this time in what direction were the witness and perpetrator facing and where was the witnesses attention directed.*
- 7) *Did the witness have a particular reason to look and remember the perpetrator.*
- 8) *Did the Perpetrator have distractive features that a witness would likely to notice and remember.*
- 9) *Did the witness have an opportunity to give a description of the perpetrator. If so, what extent did it match or not match the accused as the court finds the accuseds appearance to have been on the day in question.*
- 10) *What was the Mental, Physical and Emotional state of witness before, during and after the observation.*
- 11) *To what extent if any did the condition affect the witnesses ability to observe and accurately remember the perpetrator.*
- 12) *What was the state of lighting from which the witness was able to observe its source, and intensity and the position of the witness in respect to the perpetrator.*
- 13) *What was the time spent with the perpetrator.*
- 14) *Did the witness know the perpetrator before and for how long.*

The prosecution must by use of above criteria be able to establish that the identification of the accused was positive and free from error. In this case, there is no dispute that the witnesses know the accused. Indeed Pw1 A had sired a child with him the subject of charge. From the evidence however, it is clear that the forceful entry into the house was sudden, the witnesses were asleep and woken up by the sudden

entrance. The person did not speak to them, but picked where the deceased was, hit him and went away. The witness testified that it is the perpetrator who had a torch and flashed it at them. That would place the perpetrator in a place where the witnesses would not see him;

In **Paul Etole & Another -Vs- Republic Cri. Appeal No. 24 of 2000** the Court of Appeal stated;

The appeal of the 2nd appellant raises problems relating to evidence of visual identification. Such evidence can bring about miscarriage of justice. But such a miscarriage of justice occurring can be much reduced if whenever the case against accused person depends wholly or substantially on the correctness of one or more identifications of the accused. The court should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally it should remind itself of any specific weakness which had appeared in the identification evidence. It is true that recognition may be more reliable than the identification of a stranger; but even when witness is purporting to recognize someone who he knows. The court should remind itself that mistakes in recognition of close relative and friend are sometimes made.

All these matters go to the quality of the identification evidence. When the quality is good and remains good at the close of the accused's case the danger of mistaken identification is lessened, but the poorer the quality the greater the danger. In the present case, neither of the two courts below demonstrated any caution. This is a serious non-direction on their part. Nor did they examine the circumstances in which the identification was made. There was no enquiry as to the nature of the alleged moonlight or its brightness or whether it was a full moon or not or its intensity. It was essential that there should have been an enquiry as to the nature of the light available which assisted the witnesses in making recognition. What sort of light, its size and its position vis-à-vis the accused would be relevant.

Upon evaluating the whole evidence and the condition of identification, prevailing on that material night, I am satisfied that the same were not favourable for positive identification of the accused as the person who inflicted the injuries on the deceased. I find that the belief by the A (PW1) that it is accused who inflicted the injury may as well be mistaken because he had rejected the deceased as his child.

I therefore find the prosecution has not proved the case of Murder against the accused. I therefore find Brian Kipsang Kapkomu Not guilty of Murder and acquit him under Section 215 C.P.C. Accused be set at liberty unless otherwise lawfully detained.

Dated at Bungoma this 29th day of October, 2020.

S.N. RIECHI

JUDGE