REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 167'B' OF 2015

(An Appeal arising out of the conviction and sentence of Hon. C. OBULUTSA – (SPM) delivered on 20th November 2015 in ELDORET CM CR. Case No. 903 of 2011)

BERNARD SIMIYU WAWIRE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Bernard Simiyu Wambwire was charged with **manslaughter** contrary to **Section 202** as read with **Section 205** of the **Penal Code**. The particulars of the offence were that on 15th December 2008 at Lunyito Village, Lugari District, Kakamega County, the Appellant unlawfully killed Rael Musaba Barasa. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was found guilty as charged. He was sentenced to serve thirty (30) years imprisonment. The Appellant was aggrieved by his conviction and sentence. He has filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the basis of the evidence of identification that was not watertight. He took issue with the fact that he had been convicted on the basis of voice recognition which did not stand up to legal scrutiny. The Appellant was of the view that the trial court failed to properly evaluate the evidence that was adduced by the prosecution witnesses and thereby reached the erroneous decision that the prosecution had established its case to the required standard of proof beyond any reasonable doubt. The Appellant faulted the trial court for failing to take into account that crucial witnesses were not called to testify thereby casting doubt to the testimony adduced by the prosecution witnesses, which, in his view, was inconsistent and contradictory. He was aggrieved that his alibi defence was not taken into consideration before the trial court reached the impugned decision. The Appellant asserted that the charge sheet upon which the trial court based the conviction was defective. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, the Appellant presented to court written submission in support of his appeal. He further made oral submission urging the court to allow the appeal. Ms. Oduor for the State opposed the appeal. She submitted that the prosecution had adduced sufficient culpatory evidence which enabled the trial court convict the Appellant on the charge that was brought against him. She urged the court to dismiss the appeal both on conviction and on sentence.

This court shall revert to the arguments made on this appeal after briefly setting out the facts of this case. The deceased in this case, Rael Musaba Barasa was the mother to Ronald Barasa (PW1). The deceased and Ronald Barasa lived next to each other in Lugari Sub-location. On the material day of 15th December 2008, PW1 was at home with his son PW2 PMB. It was about 8.30 p.m. They heard a motorcycle stop at the Appellant's house. The Appellant was their immediate neighbour. Shortly thereafter, they heard the Appellant shouting that he would kill PW1. PW1 realized that the Appellant was serious. They had prior thereto had a disagreement relating to land use. It was infact a land dispute. The Appellant continued shouting that if PW1 did not get out of his house, he was going to burn down the house. PW1 and PW2 decided to use the rear entrance to the house to escape and made a report to PW3 Shadrack Osika Miyeso, the area Assistant Chief. PW3 was told by PW1 that the Appellant was threatening his life. PW3 advised PW1 to report the incident to the police. PW1 followed the advice and reported the incident to Lugari Police Post.

Meanwhile, PW4 Phyllis Nangila was with the deceased in her house. She was also with her two children S and MB. The deceased was PW4's mother in-law. PW4 testified that on the night of 15th December 2008 at about 8.30 p.m., she heard the Appellant tell PW1 that he had come to kill him. She also heard the Appellant tell PW1 that if he did not leave the house, he was going to burn down the house. PW4 was familiar with the Appellant's voice because the Appellant was their neighbour. Shortly thereafter, the Appellant went to their house and

ordered her to open the door. She complied. The Appellant was armed with an axe and a rungu. He started beating the children. The deceased gave a call of distress. The Appellant attacked her with the axe and cut her on her left leg. The cut caused the deceased to bleed excessively. PW4 managed to escape from the house. After the attack, according to PW4, the Appellant left the house.

Meanwhile, PW1 and PW2 returned back to the home accompanied by PW3, PW5 PC Joseph Kariuki and PW6 Senior Sergeant William Lelei, then based at Lugari Police Post. They immediately took the deceased and the two children who were injured to Webuye District Hospital. It was their testimony that the deceased had been seriously injured and had bled excessively. They then proceeded to the Appellant's house but did not find him. They went to the Appellant's mother's house. They found him. They arrested him and took him to Lugari Patrol Base. Post mortem was done on the body of the deceased by PW7 Dr. Lwami Nicholas at Webuye District Hospital. He formed the opinion that the deceased had died due to severe bleeding caused by the deep cut wound on the left leg. The post mortem report was produced as a prosecution's exhibit in the case.

When the Appellant was put on his defence, he denied committing the offence. He testified that he had travelled from Nairobi on 14th December 2008. He was shocked when he was arrested on 15th December 2008 on allegation that he had killed someone. He denied that he went to the house of the deceased on the material night. The Appellant's testimony was corroborated by that of his mother (DW2) Sophia Nafula Wawire who testified that on the material night of 15th December 2008 she was with the Appellant. She stated that the Appellant did not leave her house as he was watching television with her grandchildren. She asserted that the Appellant did not go to the deceased's home on the material night.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced before the trial court before reaching its own independent determination whether or not to uphold the conviction of the Appellant. In reaching its decision, this court is required to keep in mind the fact that it neither saw nor heard the witnesses as they testified and therefore cannot make any comment regarding the demeanour of the witnesses (**Njoroge –Vs- Republic [1987] KLR 19).** In the present appeal, the issue for determination by this court is whether the prosecution adduced sufficient evidence to secure the conviction of the Appellant on the charge of **manslaughter** contrary to **Section 202** as read with **Section 205** of the **Penal Code**.

From the re-evaluation of the evidence adduced and the submission made by the parties to this appeal, it was clear that the prosecution relied on the evidence of identification to secure the conviction of the Appellant. Whereas the prosecution contends that the Appellant was properly identified prior to the fatal attack, the Appellant insists that he was not at the scene at the time the deceased was attacked. The Appellant gave an alibi defence. He told the trial court, and reiterated on this appeal, that he was not at the scene of crime at the time the deceased was attacked.

This court agrees with the Appellant that before a court can convict an accused on the evidence of identification especially one made at night, the court must warn itself of the dangers of relying on such evidence of identification before convicting an accused. The Court of Appeal in **Wamunga –vs- Republic [1989] KLR 424 at Page 430** held thus:

> **"Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications 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 the identification. The way to approach the evidence of visual identification was succinctly stated by Lord Widgery C.J, in the well-known case of R v Turnbull [1976] 3 All ER 549 at Page 552 where he said:**
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> **"Recognition maybe more reliable than identification of a stranger; but, even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made"**

This need for caution was also reiterated by the Court of Appeal for East Africa in the case of **Abdallah Bin Wendo –vs- R 20 EACA 166 at Page 168** thus:

> **""Subject to well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error"."**

In the present appeal, PW1, PW2 and PW4 testified that on the material night of 15th December 2008 at about 8.30 a.m., the Appellant arrived to his house on a motorcycle then went to PW1's house threatening to kill him. PW1 and PW2 were at their house. They were able to recognize the Appellant from his voice. The Appellant called PW1 by name and told him to get out of his house so that he could kill him. When PW1 demurred, the Appellant warned him that he was going to burn down the house if he did not come out. PW1 and PW2 sneaked out of the house through the backdoor and went and made a report to the Assistant Chief (PW4) and later made a report to the police. At the same time, PW4 who was in a house next door, heard the Appellant issue the threats to PW1. Shortly thereafter, the Appellant went to their house and ordered PW4 to open the house. The deceased raised alarm. The Appellant cut the two children who were in the house and also cut the deceased on her left leg using an axe. PW4 witnessed the attack before she made good her escape.

The evidence adduced by PW1 and PW2 clearly identifies the Appellant at the scene. The evidence of PW4 is direct evidence. PW4 opened the door for the Appellant and saw the Appellant attack her two children and the deceased. Although the Appellant claims that he was not at the scene at the time the crime occurred, on re-evaluation of the evidence of these three critical witnesses, this court holds that the Appellant was properly identified at the scene. The Appellant was well known to the said three witnesses prior to the fatal attack. He was a neighbour. They identified him through voice identification when he called PW1 by name and threatened to kill him. The Appellant was in a belligerent

mood when he went to the house where the deceased was after he failed to find PW1. This court holds that the evidence of identification was watertight.

In any event, it is now settled law that the evidence of voice identification, especially where a witness familiar with the voice of the person being identified testifies to the fact that he identified the person by his voice, is admissible evidence. (See **Limbabula –vs- Republic CA Criminal Appeal No.140 of 2003).** Although motive is not necessary in establishing the charge of manslaughter, in the present appeal it was evident that the Appellant attacked the deceased due to a land dispute he had with the family. The alibi defence of the Appellant was displaced by the strong and watertight evidence of identification that was adduced by the prosecution witnesses. The Appellant's appeal on conviction lacks merit and is hereby dismissed.

On sentence, the Appellant is on a firmer ground. The trial court acknowledged that the Appellant was a first offender. Although the offence was serious and deserved a custodial sentence, this court is of the considered view that the sentence of thirty (30) years imprisonment was harsh and excessive taking into account the entire circumstances of the case. In the premises therefore, the custodial sentence of thirty (30) years imprisonment is set aside and substituted by a custodial sentence of this court of fifteen (15) years imprisonment. The sentence shall take effect from 20th November 2015 when the Appellant was convicted by the trial court. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 19TH DAY OF SEPTEMBER 2018

L. KIMARU

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 26TH DAY OF SEPTEMBER 2018

HELLEN OMONDI

JUDGE