IN THE COURT OF APPEAL

AT MOMBASA

(Coram:Kneller, Hancox JJA & Chesoni Ag JA)

CRIMINAL APPEAL NO. 45 OF 1984

BETWEEN

MBELLE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the High Court at Mombasa, Bhandari J)

JUDGMENT

The appellant was charged before the High Court at Mombasa with murdering his brother-in-law Joseph Mukunde contrary to section 204 of the Penal Code (cap 63), and, after a trial lasting seven days, was convicted by Bhandari J of the lesser offence of manslaughter in accordance with unanimous opinions of the assessors. He was sentenced to six years' imprisonment and now appeals to this court against both his conviction and sentence.

On the night of January 9, 1983 at 11.00 pm, the deceased's widow, Stella, was in her house at Kivalwa village in Taita/Taveta District with her husband and children when her husband answered a knock on the door. She said in her committal statement (though she did not repeat the actual words in court) that the caller said, in response to the question "*Nani wewe*" (who are you), "*Ni mimi*" (it is me), and that she recognized the second voice as that of the appellant. After a discussion which she then described she said she heard the deceased cry in a loud voice:

"Stella, I have been killed by your brother" (meaning the appellant) "with a knife".

Mr Prinja, appearing for the appellant in this appeal, though it must be said that he did not represent him in the court below, submitted that the case against his client really rested on the two limbs of Stella's evidence, namely her alleged recognition of the voice of the appellant and the statement of the deceased which, to have been admissible, would have to fall within the ambit of section 33(a) of the Evidence Act (cap 80) as a dying declaration. If those pieces of evidence were taken away, Mr Prinja said, the rest of the evidence did not take the case any further.

As to the first aspect, Mr Prinja submitted that the evidence of identification of the appellant by his voice

was unsatisfactory and unsafe. The evidence showed that Stella had last had contact with her brother, who had been on an overseas posting in France, some fifteen months before, in October 1981 and how could she distinguish between the appellant's voice, and, for instance, that of his brother Moses Mbelle (PW 8) who lived in another village, Mohoo village, (where the appellant also lived) about two miles from Kivalua village? Mr Prinja complained that the judge gave inadequate treatment to the evidence of identification in his summing up to the assessors and did not analyze it at all in his judgement. As none of the other witnesses who came on the scene shortly afterwards was able to identify the appellant (since we do not regard the statement of the deceased's father, Mukunde Tekeo, that it was "the first time to see the accused with that vehicle" as amounting to an identification in the context of his evidence) there only remained identification by a single witness, by voice at night, upon which the conviction of his client was based.

Apart from these considerations, the conditions for such identification were, Mr Prinja argued, poor in all the circumstances. Is it credible, he said, that Stella, in bed asleep, at once recognized her brother's voice, saying no more than two words on a surprise visit, and with the window and door shut? He referred us to the case of *Republic v Tyson* High Court (Mombasa) Criminal Case 20 of 1983, and to *R v Turnbull* (1976) 63 Car, 132, in which the guidelines accepted for trial courts regarding the principles to be applied on the visual identification of an accused person were laid down. Neither of these cases, however, referred to the tests to be applied regarding the reception of evidence of identification by voice, which of course, would almost amount to identification by recognition. Mr Prinja conceded that Stella was not challenged in cross-examination on her recognition of the appellant's voice (as she should have been) but maintained that nevertheless the judge was not relieved of the duty of administering a proper direction to the assessors and to himself on this issue.

Turning to the dying declaration, Mr Prinja took several points on this issue. First he said if the knife would penetrate the heart, as the medical evidence showed, the deceased would not have been capable of uttering the words attributed to him. Secondly, if the deceased was stabbed just outside the house, as indicated by the police officer in the fifth photograph in Exhibit 6, this was inconsistent with Stella's evidence that when she first saw her husband after he was stabbed he was coming out of the trees on the right, and that was three minutes from when she heard him cry out, both of which indicate that he was stabbed near the gate fifteen to twenty metres from the front door. If that was so, Mr Prinja continued, it would be expected that the deceased would have left a trail of blood from where he was stabbed to where he finally collapsed, though we note in this connection that the doctor said that blood would not immediately spurt out of the wound when the weapon was withdrawn because it made a very small opening in the skin. Moreover, as regards the time factor, there were a further three or four minutes to be added for the time taken by the father-in-law, Joseph Mukunde, to dress and come out of his house, all of which was said to have occurred before the deceased collapsed. Finally, remembering that all these events took place within a very narrow compass of time, and in the general confusion that must have prevailed, would it have been possible for Stella to have been accurate as to the words to be spoken respectively both by the appellant and by the deceased? None of these matters, Mr Prinja said, were canvassed by the judge in his

judgement, which it was his duty to do, notwithstanding that most of them were not put to the witnesses in cross-examination.

The foregoing matters formed grounds 2 and 10(a) and (b) of the amended memorandum of appeal but they represented the bulk of Mr Prinja's argument. Ground 4, 7 and 8 related to the destruction of the initial police statements of the witnesses after the new committal procedure came into force, strong criticism of the evidence of the appellant's brother, Moses Mbelle, with particular reference to the occasion earlier on the fatal day when according to his committal statement, their mother, on hearing of the appellant's stated intention to kill the deceased and his wife, said she would kill herself, and the appellant said he would kill her first; and criticism of differences between several of the witness' respective committal statements and their evidence in court. Mr Prinja eventually abandoned his contention that the brother of the deceased who took the barmaid, Hannah Njeri, to the police was Ezekiel Mukunde, who was not called to testify, but who "happened to be passing" Makande Lodemi's (PW 7's) *shamba* after the latter had found the knife, Exhibit 4, six weeks after the killing.

We have examined these grounds of appeal in conjunction with the evidence before the judge and the committal documents, and though we agree it was unfortunate that the earlier police statements were destroyed, we are satisfied that none of these three grounds of appeal are such as to enable us to say that the judge erred in any of these respects, or that the appellant's conviction was thereby vitiated.

Reverting to the issues of the alleged identification by voice and of the dying declaration, we cannot agree with Mr Prinja that these formed virtually the only evidence against the appellant. There was the completely unchallenged evidence of Mr Habatan that four days after his return to Kenya on January 2, 1983, he hired a Suzuki four-wheel drive vehicle, KTR 120, white in colour, from Motor and Marine Enterprises Ltd, whose emblem can, indeed, be seen in the ninth photograph, for the purpose of getting to his home in Taita.

Following this, Mr Metho, who appeared for the Republic, drew our attention to several events which occurred on January 9 which formed substantive, and not merely corroborative, evidence against the appellant. Moses Mbelle, who lived in the same homestead as the appellant, was attracted by noise coming from his room, and observed the argument between the appellant and his wife and mother, and that the appellant was holding the knife, Exhibit 4, and the pistol Exhibit 5, which he then handed over to his mother. Shortly after this the appellant drove away in the white Suzuki, KTR 120, only to return at about 5 pm and demand to know from his wife where the knife had been hidden. After some hesitation she gave the knife to the appellant who drove off with it.

At the time of the deceased's death at or around 11 pm on the same day, Stella saw a vehicle outside the gate, stationary and with its lights on, and when it was driven away she saw the spare tyre on the rear and said that it "looked like a Land Rover". A neighbour, Kinga Hare, however was more positive. He heard a vehicle being driven past at a slow speed going towards the deceased's house. Shortly after he heard loud cries, and saw a vehicle coming from the direction of the deceased's house at speed and memorized the number, KTR 120, which he saw by the number plate light. Again, none of these matters were very seriously challenged in cross-examination. The deceased's brother, Jackson Mukunde, gave a similar account of seeing the vehicle KTR 120, which was white in colour, and which he identified in the photograph's reverse and drive off after he was called out from his house by Stella to go and assist the deceased. Finally, the deceased's father, who had seen the appellant with it earlier that day, also mentioned the vehicle, which drove off, after the incident.

In addition to the foregoing, the barmaid, Hanna Njeri, testified that she saw the appellant threaten the deceased with the flick-knife, Exhibit 4, in November, 1981 in a place called the Kedong or Kedogo Bar.

In response to this evidence, the appellant made an unsworn statement. After recounting that he had arrived in Taveta on January 6 and had hired a car to carry his luggage he contended himself with a bare denial of the charge. He did not even set up an alibi, or suggest provocation, a matter which was later left to the assessors by the judge. He said that contrary to the allegation that he bore the deceased a grudge, they had in fact been quite friendly until shortly before he was killed.

Mr Prinja, in arguing grounds 5 and 6 of his appeal, alleged that the judge had considered the cases of the prosecution and of the defence in isolation to each other and had first accepted the evidence adduced by the prosecution, thus throwing the burden of rebuttal on the appellant and making it inevitable that he would reject his defence, contrary to the rule laid down in *Oketh Okale v Republic* [1965] EA 555 per Crabbe JA at p559.

We do not think that this criticism is justified. The learned judge set out the case for both the prosecution and the defence in some detail. Then he said, correctly, that the burden was on the prosecution to prove the case against the accused, as he was then, beyond any reasonable doubt. He emphasized the presumption of innocence. He analyzed in detail the discrepancies between the witnesses, and between their testimony in court and their committal statements. Having done so, he reached the conclusion that the prosecution witnesses had told the truth. It is true that in reaching that conclusion he used the phrase 'reasonable doubt' but though he may have been guilty of undue emphasis at that point, it is clear that his conclusion on the credibility of the witnesses enabled him to reach the finding that it was the appellant

who had stabbed the deceased on the fatal evening after an altercation. It then followed inevitably that the appellant's story was for rejection. We do not think the judge transposed the respective sides' opinions that the appellant was guilty of manslaughter only. The judge was then in the position that he would have at least to say why he disagreed with the assessors if he went on to convict of murder. It may be that the issue of provocation was not raised by either side. It certainly could not have been by the defence because, according to them, they were not there. But given the circumstances of an altercation between the parties, followed by a fatal stabbing, the judge was perfectly right in leaving the issue of provocation to the assessors. Had he not done so he might have attracted the criticism made in relation to other aspects of his judgement. We do not agree that there is any misdirection, or an inconsistent verdict here. Ground 1 of the appeal therefore fails, as do grounds 3,4,5,6,7 and 8 for the reasons we have given.

The case in our view was rightly treated as one of circumstantial evidence. The hiring of the Suzuki Vehicle, KTR 120, and the fact that the appellant was seen to drive it on the fatal day, plus the fact that it was observed by three witnesses leaving the scene of the killing, coupled with the appellant's antecedent possession of the flick-knife, (a deadly weapon, fortunately rare in Kenya) and his earlier threats on that day, provided an extremely strong case against him, to which he gave a defence merely denying that he committed the crime, which the judge rightly rejected. Therefore, while we agree with the necessity for caution inherent in the reception of the evidence of voice identification and of the dying declaration, these items of evidence only served to augment the already strong case against the appellant. We think, however, in the circumstances of this case that these two pieces of evidence were admissible and were rightly taken into consideration with all the other evidence, though, in relation to the dying declaration, we respectfully agree with the comments of Crabbe JA in *Oketh Okale v Republic* (*supra*) at pages 558 and 559 that it is unsafe to base a conviction solely thereon. We regard the other cases cited by Mr Metho, *R v Eligu s/o Odel* (1943) 10 EACA 90, and *Tuwamoi v Uganda*, [1967] EA 84 as having a similar effect. Moreover, once received in evidence the court would have to be satisfied that the declarant did in fact recognize the accused person as his assailant.

In relation to the identification by voice, care would obviously be necessary to ensure (a) that it was the accused person's voice, (b) that the witness was familiar with it and recognized it, and (c) that the conditions obtaining at the time it was made were such that there was no mistake in testifying to which was said and who said it. In the instant case we are satisfied, on our own evaluation, as we have indicated, that the reception of the evidence as to the voice identification and the dying declaration was correct and safe. Grounds 2 and 10(a) and (b) of the appeal therefore fail. Ground 9 was, in our view, similar to ground 8. It was not specifically argued and in our opinion fails also.

We therefore consider the judge was entitled, on the evidence before him, to convict the appellant of manslaughter contrary to section 205 of the Penal Code and we dismiss the appeal against his conviction. The sentence was by no means excessive for the serious crime which the appellant committed, using a deadly weapon with which he had previously armed himself. We accordingly dismiss the appeal against the sentence also.

Appeal dismissed.

Dated and Delivered at Mombasa this 23rd day of July 1984.

A.A.KNELLER

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JUDGE OF APPEAL

A.R.W.HANCOX

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JUDGE OF APPEAL

Z.R.CHESONI

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AG. JUDGE OF APPEAL

I certify that this is atrue copy

of the original.

DEPUTY REGISTRAR