IN THE COURT OF APPEAL

AT KISUMU

[CORAM: OKWENGU, KIAGE & SICHALE, JJ.A]

CRIMINAL APPEAL NO. 5 OF 2016

BETWEEN

BEN CHACHA MARWA ..... APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Migori (D.Majanja, J) dated 22nd October, 2015

in

HCCRC NO. 82 OF 2014

****

JUDGMENT OF THE COURT

Before us is an appeal from the conviction and sentence of the appellant (**Ben Chacha Marwa**) by a judgment dated **22nd October, 2016** by **Majanja, J**. A brief background will give context to the appeal.

The appellant was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code, the particulars being that on **26th April, 2012** at Isebania Township in Kuria West District within Migori County, jointly with others not before court he murdered **Stanley Omoya** (the deceased).

A trial ensued at the High Court of Kenya at Kisii conducted by. **Sitati, J**. who took the evidence of P.W.1, P.W.2 and P.W.3. Following the gazettment of Migori High Court vide Gazette Notice No. 5176, the matter was transferred to the High Court of Kenya at Migori. **Majanja, J** took over the matter and proceeded to take the evidence of P.W.4 having complied with Section 200 of the Criminal Procedure Code (CPC) wherein the appellant opted to continue with the matter from where it had reached. At the conclusion of the trial, the appellant was found guilty of murder, convicted and sentenced to death.

The appellant was aggrieved with the conviction and sentence. In a Memorandum of Appeal filed in this Court's Registry on **28th June, 2019**, he listed five (5) grounds faulting the trial court that:

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> ***(1) The trial court failed to consider that one Mogesi Luchambui and the watchman by the name Kori who informed P.W.2 and P.W.3 of the alleged incident were crucial witnesses and that failure to avail them was fatal to the prosecution case.***
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> ***(2) The trial court failed to consider that the prosecution case was full of contradictions in regards to the medical facility where the alleged victim was treated.***
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> ***(3) The trial court failed to note that the evidence of Christopher Chacha was an afterthought since he did not inform anybody of the alleged offence until when he came to testify in court.***
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> ***(4) The trial court failed to appreciate that the deceased did not make dying declaration despite the fact that he talked to P.W.3***

before his death.

(5) The trial court failed to comply with Section 211 CPC at the close of the prosecution case".

On **23rd November, 2020**, when the appeal came up before us for virtual hearing, in view of the Covid-19 Pandemic and pursuant to the guidelines issued thereon, **Mr**. **Omondi,** learned counsel represented the appellant, whilst the respondent was represented by **Mr. Kakoi**, learned Principal Prosecution Counsel for the State. In support of the appellant's case, **Mr. Omondi** argued that the appellant was convicted based on the evidence of a single identifying witness hence, the judge ought to have warned himself against the danger of relying on the evidence of a single witness; that the conditions were not favourable for making a positive identification as the attack was at night by a gang; that P.W.1 could not have had sufficient time to identify the assailants; that there were inconsistencies in the prosecution evidence as regards weather conditions as the investigating officer alleged that the incident had happened at night in a narrow path and after it had rained the previous night, whilst P.W.1 said he identified the appellant with the help of moonlight yet it was probable that there were shadows that caused darkness due to the heavy rains; that the circumstances were not safe for a positive identification and finally that the conviction on the evidence of a single identifying witness was not watertight. The second issue that counsel addressed was on sentence. He argued that the death sentence was not lawful as courts have been given discretion to determine the appropriate sentence and that in sentencing the appellant, his mitigation was not taken into consideration.

In opposing the appeal, **Mr. Kakoi** relied on the respondent's written submissions filed on **9th March, 2020**. On identification, he stated that the appellant was recognized by P.W.1 who had known him for three (3) years and that there was light from the moon that night; that the appellant in his unsworn statement had admitted that they knew each other and that on that day, he had an altercation with the appellant. Counsel urged that the appellant's conviction was safe. On the issue of an existing grudge, counsel countered this by stating that this was not brought out during cross-examination. He maintained that the evidence was consistent; that there was no reason for the killing but that the appellant cut the deceased on the road. He was of the view that if the sentence was to be reviewed, then it should not be less than twenty (20) years imprisonment.

In a brief rejoinder, **Mr. Omondi** reiterated that the attack was on **26th April, 2012** whilst the altercation happened after the attack on **27th April, 2012**. He added that the standard of prove must be beyond reasonable doubt and that the burden does not shift to an accused person as it was the duty of the prosecution to proof its case beyond reasonable doubt. In reviewing the sentence, counsel urged us to consider the time the appellant has been in prison.

We have considered the record, the rival oral and written submissions, the authorities cited and the law. This is a first appeal and the duty of a first appellate court of re-evaluating the evidence and subjecting the evidence to a new examination has been recognized in many decisions that have come forth from this Court. For instance, in ***Okeno vs. Republic [1972] EA 32,*** this Court stated thus:

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination … and to the appellate court's own decision on the whole evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions….It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and conclusions. Only then can it decide whether the magistrate's findings and conclusions should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses …"***

A brief review of the evidence before the trial court indicates that on **26th April, 2012** at around 8.30 p.m., **Christopher Turucha Ongubo** [P.W.1], was escorting **Stanley Moya** (the deceased) who had paid him a visit to seek financial aid when the appellant, while in company of another person, attacked them. It was the testimony of P.W.1 that he was able to recognize the appellant whom he had known for three (3) years with the help of light from the moon; that after the attack, P.W.1 ran for his dear life and he himself hid in a bush for about 30 minutes after which he heard screams from the home of the deceased; that he rushed to the home of the deceased and heard that the deceased had been attacked, injured and had been rushed to the hospital. Later, he learnt that the deceased had succumbed to the injuries inflicted upon him during the attack that night. P.W.1 reported the matter to the police the following day (**27th April, 2012**) and gave the name of the person who had attacked the deceased, inflicting the injuries which caused his death.

Mogesi Lichambui (P.W.2), father to the deceased heard screams on **26th April, 2012** at around 10 .00 p.m. and rushed to the gate in company of his other son, **Stephen Samuel** (P.W.3). Outside the gate, he saw the deceased lying down with a cut wound on the left arm; he rushed him to Ombo Hospital where he died while undergoing treatment. He recorded his statement with the police on the following day (**27th April, 2012**). **Bashir Chacha Nyambogai** (P.W.4), a neighbour to the deceased's family identified the body of the deceased to **Dr. Daniel Otieno Agulo** (P.W.4, should be P.W.5) who performed a postmortem examination on the body of the deceased on **2nd May, 2012**. According to P.W.5, the deceased had a deep cut wound round the left elbow anteriorly severing the brancial artery, which is the main artery to the left arm. In the doctor's opinion, the cause of death was "*cardio pulmonary failure secondary to profuse external bleeding*". P.W.5 signed the postmortem report which was later produced in evidence.

On **27th April, 2012**, **Cpl Albashir Oloo** (P.W.5, should be P.W.6) was assigned to investigate the case of a murder that had occurred on **26th April, 2012**. P.W.6 recorded witness statements from P.W.1 to P.W.5 and entirely relied on the evidence of P.W.1 who witnessed the murder. He did not recover any weapon. According to P.W.6, the appellant was arrested on **27th April, 2012** by members of public and was subjected to "*mob justice*" before being rescued by the police. After investigations, he charged the appellant with the offence of murder.

In his defence, the appellant gave an unsworn statement of defence and did not call any witness. He admitted knowing P.W.1 with whom he had altercations over his sister. The appellant alleged that P.W.1 had impregnated his sister, forcing her to drop out of school and that there was a grudge between his family and P.W.1; that P.W.1 had threatened the appellant and had thus fulfilled his threats by having him charged with the offence of murder. The appellant denied the offence and urged the trial court to dismiss the prosecution case. The trial court however found the appellant guilty of murder and sentenced him to death.

Suffice to state that the appellant was convicted on the evidence of a single identifying witness, P.W.1. The time of the attack according to P.W.1 was about 8.30 p.m., hence, in the hours of darkness. P.W.1, however told the trial court that he was able to identify the appellant using moonlight. The evidence of P.W.1 is that

> *"... I saw 2 people approaching from opposite direction, one had a Marvin hat, so I was not able to identify him. The other had no hat on the head, so I was able to identify him. When they reached where we were, I identified the face of the one who had no hat. It was full moon and very bright. I had known that person I identified for about 3 years.*
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> *As we met, we were attacked with pangas and each one of us ran and hid in a bush. I remained there for about 30 minutes before I heard screams. I stood up and listened. The screams came from the deceased's home.*
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> *I rushed to the deceased's home. I heard people saying he had been cut and had been taken to hospital. I ran to the hospital – the Isebania Sub-hospital known as Nyayo.*
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> *At the hospital, I was informed the deceased had been taken to Ombo Mission Hospital. I went back home and slept until the following morning.*
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> *In the morning, I went to the deceased's home while (sic) I found many people morning (sic). They were all saying ... (Stanley, the deceased) had died.*
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> *I decided to go to Ombo Mission to try and confirm what the people were saying.*
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> *At Ombo, I went to the mortuary where I saw deceased's body. He had been out (sic) on the left hand at the elbow joint.*
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> *I went back to Isebania and straight to the police station. At the station, I found deceased's father who had already recorded a statement. I told the police that I know the person who had cut the deceased. I told them it was Bar (sic) though I did not know the other name. We went to look for Ben, found him and arrested him".*

It would appear to us that even after the attack P.W.1 went to the deceased's home, and thereafter proceeded to his place to sleep until the following day, thereafter going to Ombo Mission Hospital. All this time he did not say who had attacked the deceased. In his evidence, he stated that it is when he went to the police station where he found the deceased's father who had already recorded a statement that he told the police that the person responsible was "***Ben***", the appellant. In our view, P.W.1 should have used the first opportunity when he went to the deceased's home on the same night to disclose that the attack was by the appellant. The narration of the sequence of evidence given by P.W.1 causes us some uneasiness. We are of the considered position that the incident having occurred at night and the single identifying witness (P.W.1) not having been quick to point out the assailant, leaves some doubts as to whether the appellant's conviction was safe. The risks of miscarriage of justice due to mistaken identity under such circumstances have been the subject of many pronouncements of this Court. See ***Roria vs. Republic [1967] EA583*** where it was observed that evidence of identification must be scrutinized carefully and with extreme caution and that:

> ***"A conviction resting entirely on identity invariably causes a degree of uneasiness, and as LORD GARDNER, L.C said recently in the House of Lords in the course of a debate on s.4 of the Criminal Appeal Act 1966 of the United Kingdom which is designed to widen the power of the court to interfere with verdicts:***
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> ***"There may be a case in which identity is in question, and if any innocent people are convicted today, I should think that in nine cases out of ten - if there are as many as ten- it is in a question of identity."***
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> ***That danger is, of course, greater when the only evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld, it is the duty of this Court to satisfy itself that in all circumstances, it is safe to act on such identification. In Abdala bin Wendo and Another vs. Republic (1) this Court reversed the finding of the trial Judge on a question of identification and said this (20 E.A.C.A. at p.* 168):**
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> ***"Subject to certain 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 the 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 view of this doubt, we think the ends of justice will be well served if the appellant is given the benefit of the doubt.

Accordingly, we quash the conviction, set aside the sentence and direct that the appellant be forthwith released unless he is otherwise lawfully held.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH, 2021.

HANNAH OKWENGU

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR