



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: NAMBUYE, KARANJA & KIAGE, JJ.A)**

**CRIMINAL APPEAL NO. 81 OF 2020**

**BETWEEN**

**PETER NGANGA KINYUA.....APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

(Appeal from the Judgment of the High Court of Kenya at Chuka (Limo, J.) dated 20th February, 2020 in H.C. CR. Case No. 8 of 2017)

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**JUDGMENT OF THE COURT**

The appellant, **Peter Nganga Kinyua** (Kinyua) was arraigned before the High Court at Chuka on a charge of murder contrary to **section 203** as read with **204** of the **Penal Code**. The particulars set out in the information were that on 11th June, 2017 at Chuka Township within Tharaka Nithi county, he, jointly with others not before court, murdered **Duncan Bundi** ('Bundi').

Kinyua pleaded not guilty to the charge whereupon a trial ensued with the prosecution calling a total of 7 witnesses. Their star witness was PW1 **Alex Mugendi**. (Mugendi). His testimony was to the effect that on 10th June, 2017, he and Bundi, who were friends and students at Chuka University, went to Kimwa Club in Chuka town where they drank alcohol until midnight. There were more than 50 students at the club as well as local residents. At about midnight, Bundi fought with Kinyua at the dance floor over some misunderstanding that Bundi did not know about. He separated them and they all continued dancing and drinking until 3.30pm when the duo started fighting again. The watchman and other patrons ejected them from the bar but they continued fighting down the stairs.

Mugendi stated that as they fought, Kinyua dropped his car keys which got stepped on and his car got unlocked remotely and he started shouting "thief! thief" and called out to boda boda riders. Sensing danger, Bundi and Mugendi fled for safety. Their flight to safety was thwarted by Kinyua who drove ahead and cut them off. He was in a group of about 30 people but Mugendi says he could make him out as he came out of his car and there were street lights. Mugendi and Bundi took a turn to avoid meeting Kinyua and the crowd but as Bundi was tiring, he was caught up with by part of the crowd who took him where the rest were and they fell upon him beating him senseless. He said he saw Kinyua among that crowd and that he threw a stone and struck Bundi with a stick. The crowd also kicked Bundi.

As this was happening, Mugendi ran to their college some 3km away, and called his friends, Tony Mwanda, Douglas and Beatrice, and together they went to Chuka Police Station where he thought Kinyua and his group had taken Bundi. He also telephoned Bundi's parents. They did not find Bundi at the station so he and part of his group went back to the scene while others went to check at the hospital. At the scene they found him badly injured with his legs broken but still breathing. They took him to hospital but after about 30 minutes he was pronounced dead.

Mugendi recorded a statement with the police.

In cross examination, he admitted to giving testimony that was materially different from what was in that statement including the claim that he saw Kinyua take a stone and throw it at Bundi, which he did not record in the statement. He also said he was hiding behind a thicket while Bundi was being beaten. He further stated that he did not know Kinyua before and did not know his name but he nevertheless recognized him alone among the mob.

Bundi's father **Moses Mwiti** (PW2) testified that his wife received a call from someone she did not know at 5.00am on 11th

June, 2017. The caller told her her son needed medical attention having been beaten. The couple together with PW2's brothers rushed to

Chuka town where they found Bundi lying on the ground surrounded by people but none was helping him. The four took him to Chuka hospital but he died a few minutes later.

The testimony of **Dr. Justus Kitili**, the Senior Medical Officer at Chuka Hospital was that he conducted a post-mortem examination on Bundi's body. Externally, he noted multiple bruises on the head, chest, back abdomen, thigh, hip and foot. Internally he had a fractured rib, lacerations on the liver with blood in the abdomen. He had a blood clot on the brain and a fracture of the occipital skull bone. The doctor formed the opinion that the cause of death was severe head injury inflicted with a blunt object which he noted in the post mortem report he produced.

Police Sergeant **Alex Nderitu Wambugu** testified that a report was made at the Chuka Police Station on 11th June, 2016 at 6.20am by two University students, Humphrey Kirimi and Tony, that their colleague had been attacked. He and another officer went to the scene but did not find the victim.

The matter was investigated by Chief Inspector **Mohammed Aden** (PW6). He confirmed that the reportees were **Tony Mwenda** and **Humphrey Kirimi** and that their report was to the effect that Bundi had been attacked "on allegation that he was attempting to steal a car." He visited Kimwa Bar and interviewed a number of witnesses who spoke of Bundi and Kinyua drinking and fighting twice that night and had to be thrown out during the second fight, which they continued down the stairs of the building. The commotion attracted other people and at some point Kinyua raised alarm that his car was being stolen whereupon boda boda riders gave chase, outflanked the fleeing Alex and Bundi. They caught up with the latter and beat him up.

Kinyua was arrested in Kiambu where he worked as a civil servant on 12th June, 2017 and escorted to Chuka Police station. At an identification parade mounted on 14th June 2017, witnesses identified him "as the person who fought with the deceased." They were not present at the scene where Bundi was beaten. That parade was conducted by Chief Inspector **Evans Wafula**. (PW7). It emerged in his testimony that he attempted to suppress an identification report in which three identifying witnesses, whom he later described as "uncooperative and a bit arrogant" all stated that "the suspect was not on the parade." He did produce another report in which four identifying witnesses, all university students, stated that they saw Kinyua at Kimwa bar on the fateful night. They were not called to testify, He also testified that Kinyua protested that the identification parade was not fair as his photograph had previously been circulated online in connection with the incident.

At the end of that prosecution case, the learned Judge, **Limo, J.** placed Kinyua on his defence. In sworn testimony he stated he got to Kimwa bar between 10 and 11pm on the fateful night and drank alcohol with some friends who left at about 12.30 am. He remained behind to finish his drink and clear the bill while his cell phone charged, when a young man he did not know came to the counter where he was and knocked over his bottle of beer spilling its contents. When Kinyua asked him why he did so, the young man, apparently drunk, answered back rudely and went away only to turn 20 minutes later with two others and start fighting him. They roughed him up tearing his jacket. The buttons of his shirt also came off.

The security personnel at the bar came and pushed the group out of the bar but Kinyua pleaded that he was a regular customer, had left his phone charging and had an unpaid bill. They allowed him to get back in while his attackers left. He checked his jacket and found his car keys missing. Thinking they dropped in the scuffle, he started looking for them on the floor in vain. He went towards the bar entrance only to see his car doors open and the lights on inside. Instinctively, he shouted "thieves" as he rushed downstairs to recover his car from someone he saw on the driver's seat with another on the passenger seat.

As he got there the two people fled on foot. He took the key off the ignition and locked the car. A crowd had gathered and he explained that some people had attempted to steal his car. Just then the two people who fled started pelting them with stones. This angered the crowd which charged after them. He did not join in the chase but went to the bar, paid his bills and went home. He insisted that save for the time he had the altercation, with the young man in the bar, he never met or saw him again. He went home before leaving for his Kiambu work station on Sunday. On his way, a friend told him that his Facebook profile photograph was being circulated at Chuka University in connection with a student's death and his car was being mentioned. He went to work on the Monday only to be arrested in the evening at his house. He was taken to Chuka where he was later charged with manslaughter then later murder. He denied any involvement.

The learned Judge considered the totality of the evidence, believed the prosecution over the defence, which he rejected, and by a judgment dated 20th February, 2020, found the offence proved.

He duly convicted Kinyua after considering the mitigation offered, he sentenced him to serve 15 years imprisonment.

Aggrieved by both conviction and sentence, Kinyua filed a notice of appeal and, in a memorandum of appeal filed on his behalf by the firm of Wahome Gikonyo & Co. Advocates, he complained that the learned Judge erred by;

- Holding that PW1 was able to identify him as one of the attackers yet the conditions were not tested and found to be free of from any possibility of error.
- Failing to test with greatest care the evidence of the single identifying witness or warn himself of the danger of relying on such evidence which was also contradictory and unreliable thus occasioning a miscarriage of justice.
- Failing to find that without a description of Nyaga in the first report, the subsequent identification parade was useless and of no evidential value.
- Failing to resolve the doubts in the case in Kinyua's favour
- Relying in the prior quarrel and fight a proof that Kinyua was one of the attackers.
- Holding that PW1 clearly saw Kinyua yet he admitted that he did not mention that he saw Kinyua throw a stone at the deceased.

- Meting out the sentence that was manifestly harsh and excessive in the circumstances.

At the hearing of the appeal had virtually on the Go-Meeting Platform, due to the Covid-19 Pandemic, **Mr. Wahome Gikonyo** urged the appeal for Kinyua. He relied on written submissions which he highlighted before us. Terming this an unfortunate case in which the trial Judge relied on the evidence of a single identifying witness in unfavourable conditions, he faulted the learned Judge for not testing the said evidence carefully and for not as much as warning himself of the dangers of relying on such evidence in the circumstances. He pointed out that the incident occurred at night after PW1 had been drinking and was afraid for his life. Moreover, he admitted that in his police statement he omitted the critical part he stated in court that he saw Kinyua throw a stone at the deceased. Counsel blamed the Judge for accepting and relying on that part of PW1's testimony despite that glaring omission and contradiction.

Citing ***PETER WAHIGA KABIRU vs. REPUBLIC [2019] eKLR*** which referred to the oft-cited ***MAITANYI vs. REPUBLIC [1986] eKLR***. Mr. Gikonyo emphasized the need for a court to test with greatest care the evidence of a single identifying witness in difficult circumstances and added that a failure to warn itself of the dangers inherent in relying on such evidence amounted to an error of law.

**Mr. Gikonyo** finally emphasized that the prosecution had failed to prove the offence against Kinyua as the witness whose evidence formed the fulcrum of the case was unreliable having given three versions of evidence on the circumstances surrounding the incident. In particular, counsel stressed that witnesses' failure to record in his statement to the police shortly after the incident that he saw Kinyua throw a stone at the deceased. Combined with the fact that it was at night and he was in distress and had to hide from the mob, it was counsel's view that his evidence alone was unsafe for the learned Judge to rely on to found a conviction.

For the Republic, learned Senior Principal Prosecution Counsel Mr. Ondimu announced that the appeal was conceded and referred us to the written submissions, he filed, which espoused the same position. He stated that Kinyua's participation in Bundi's death was not proved by the evidence on record. He also agreed with the appellant's counsel that PW1 gave different contradictory versions of what transpired on the fateful night. He also pointed out that the learned Judge put much emphasis on the identification parade form produced but failed to appreciate that the identifying witnesses were themselves not called to testify. Nor were they named. Given that state of the evidence the State had no option but to concede.

We have given this matter due and anxious consideration. We think that whereas it is indeed tragic that a life was lost in the circumstances as appear from the record, the duty of a court to ensure that the evidence presented does in fact prove a criminal case beyond reasonable doubt should never be lost sight of.

As a first appellate court we have duty to reappraise the entire evidence subjecting it to a fresh and exhaustive scrutiny so as to arrive at our own independent inferences of fact, though making allowance for the fact that we have not had the advantage of seeing and hearing the witnesses as they testified. See ***OKENO vs. REPUBLIC [1972] EA 32***. This is a duty that must be scrupulously discharged and an appellant is entitled to demand that it be discharged as it is what gives meaning to an appellate process.

Having ourselves considered the record, we think, with respect, that the complaints raised on Kinyua's behalf have substance and that the State was correct in conceding the appeal.

Such concession is of itself not binding on us and we can only agree with it if the record supports it. And in this case it does.

We are troubled that the learned Judge failed to see the glaring contradictions and discrepancies in the prosecution's star witness' evidence. He gave three versions of what transpired on that fateful night as pointed out by counsel for both sides. There are other inconsistencies such as the fact that he claimed to have made the report to Chuka Police Station yet the report officer was categorical that it was two other students who made the report. He also claimed to have called Bundi's parents and that he was with them as they took him to hospital yet the testimony of the father was that on arrival at the scene they did not find anyone helping Kinyua.

The more critical discrepancy relates to his claim in court that he saw Kinyua throw a stone at Bundi and hit him with a stick, yet he never mentioned this to the police. It is not lost to us that he had himself been drinking with Bundi that night; he was terrified in fear of his own life; he was hiding behind a thicket to avoid discovery and so was definitely at a distance from the scene where the mob assaulted Bundi. It was at night and so it cannot be said with any degree of certainty that the conditions were such as to eliminate any possibility of error in the identification of Kinyua, a person who was until that night a stranger to him.

Given the law restated in many cases that a trial court should test the evidence of visual identification by a single witness with the greatest care to eliminate the potential for mistaken and injustice inherent in such evidence and further on the need for the court to warn itself of the danger of relying on such evidence, we find that the learned Judge's failure to do both rendered the conviction unsafe.

The rival versions of evidence presented before the Judge were that of PW1 which was contradictory and unreliable and that of Kinyua who described the events of the night and indicated that he reasonably believed that his car was being stolen and raised an alarm and no more. Weighing the two, we have serious doubts that the learned Judge was right to discount the latter version. We are unable to agree that raising an alarm under the circumstances described by Kinyua under oath and unshaken in cross-examination, justified the learned Judge's conclusion that he led and incited the mob of boda boda riders to commit murder.

Had the learned Judge approached the evidence with the careful circumspection that the circumstances clearly demanded, he would in all probability have returned a different verdict. We think that whereas it is plausible Kinyua may have triggered the events of the night from the moment he raised the alarm, the evidence as a whole was not enough to prove beyond reasonable doubt and justify conviction on the serious charge of murder. It has been said many times that such conviction should be based on solid evidence. Suspicion, no matter how strong, is not enough.

Being of that mind, we find the conviction to have been unsafe and quash it. We also set aside the term of imprisonment imposed on Kinyua.

We order that he be set at liberty forthwith unless otherwise lawfully held.

Order accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 9<sup>TH</sup> DAY OF JULY, 2021**

**R. N. NAMBUYE**

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**JUDGE OF APPEAL**

**W. KARANJA**

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**JUDGE OF APPEAL**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

signed

**DEPUTY REGISTRAR**