IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), MURGOR & KANTAI, JJ.A)

CRIMINAL APPEAL NO. 91 OF 2018

BETWEEN

DUNCAN THUKU MWANGI..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from a Judgment of the High Court at Nairobi (Lesiit, J.) dated 20th September, 2016

in

H.C.CR.C No. 79 OF 2005)

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JUDGMENT OF THE COURT

The appellant was charged under **section 203** as read with **section 204** of the Penal Code alongside two other accused persons being Peter Githongo Maina and Elizabhan Njoroge Kuria. The latter two were acquitted for lack of evidence. The appellant was however convicted and sentenced to death.

The trial court was convinced that the facts in the case proved that on 2nd April, 2005 at 7.30 pm in Kibera slums in today's Nairobi County, the deceased was leaving a bar, Annex Club, which he owned. As he entered his motor vehicle and preparing to drive off, two men approached his car and intercepted him. One of the men knocked at his driver's side window and ordered the deceased to get out of the vehicle. Upon the deceased alighting in obedience to the order, the man asked him why he was causing trouble and before the deceased could even reflect on the question, he was shot dead. The two assailants entered the vehicle of the deceased and after trying in vain to start the vehicle, abandoned the attempt and fled on foot while shooting in the air to scare people from the scene. The duo then hijacked a *matatu* and drove away in it.

This incident was witnessed by PW1, who was the manager of Annex Club, PW2 who was an attendant at Maya Filling Station, which was located on the ground floor of the bar, and PW3 who was the son of the deceased.

The trial court also considered the evidence that prior to the deceased's death, he had received threats on his life and had made a report to Central police station on 24th September, 2004 of conspiracy by some named people to kill him. The deceased had attributed these threats to his Co-Directorship of Kiambu Land Buying Company, which was experiencing rebellion and leadership conflict. The conflict was so bad that there were two factions. The persons he named to the police as his would be killers were arrested but eventually released without any charges being preferred. According to PW7, the deceased's file had been forwarded to the Office of the Director of Public Prosecutions (ODPP) but the deceased was murdered before they could complete investigations.

Interestingly, on the same afternoon that he was murdered, the deceased had shared his fears with PW4, the Village elder of Kibera where he had a business, and three Chiefs and Assistant Chief of the same area.

From the autopsy report, it was clear that the deceased died from gunshot wounds on the head. An identification parade was conducted and out of the three witnesses, two witnesses, only PW1 and PW3 were able to positively identify the appellant as the man who shot the deceased.

The appellant in his defence stated that he was employed in Kayole, in an office where his duties entailed cleaning and welcoming customers. He said that the office sold and bought plots; that his wife was sick and expectant and that he had requested his boss to allow him time off from 4:30pm to go home to attend to his sick wife; that on the day material to this matter he went to work and remained at work until 4pm when he returned home; that on reaching home, he found there was no water. After drawing water, he cooked, watched the news and slept; and that he did not leave his house again that night. His wife, DW4, corroborated this evidence by confirming that the appellant did not leave the house from 5 pm until the next day.

The appellant insisted that though PW1 and PW3 purported to identify him at the identification parade, he did not know the deceased.

The trial court *(Lesiit, J.)* found the appellant guilty of the murder of the deceased based on positive identification and said:

> **"68. I find that the circumstances of identification, the conditions of lighting at the scene, the distance at which PW1 and 3 saw the assailant, the length of time it took them to see the assailant and the ability to identify him in the ID parade, all together were safe and positive for a correct identification of the 3rd accused as the one who fatally shot the deceased. I am satisfied that the 3rd accused was properly identified as the one who shot and caused the deceased death."**

The appellant, on this finding, was convicted and accordingly sentenced to suffer death.

Aggrieved, the appellant has lodged this appeal on 14 grounds challenging both his conviction and sentence. He has faulted the manner the identification parade was conducted alleging that the prerequisites to holding a parade were not met; that there was no first report on identification of the appellant; that the prosecution failed to avail crucial witnesses; that the prosecution evidence did not meet the required standard of proof; that the appellant was convicted on suspicion without credible evidence; that it was wrong to acquit the 1st and 2nd accused persons and to convict the appellant on the same evidence; that the court relied on the evidence of recognition which was not reliable; and that the appellant's defence was disregarded.

At the hearing of this appeal, Mr. Ondieki, learned counsel for the appellant pointed out that the prosecution did not summon critical witnesses who were said to have witnessed the fatal shooting. Secondly, counsel asked us to find that the identification parade was flawed and not conducted in accordance with chapter 46 of the Force Standing Orders, apart from the fact that there was no proper description of the appellant by the witness before the parade was convened; that the purported description of the appellant as "medium, brown, slim, tall" was not helpful as it was not possible to be medium and tall at the same time; that since the incident took place at night, it was incumbent upon the prosecution to explain the position and distance of the source of light from the scene of the shooting; that while PW2 stated that there was one big bulb, PW3 contradicted him by stating that there were more than 20 bulbs at the scene; and that on the other hand, PW6 stated that he saw the two bullet wounds on the deceased's head with the aid of a torch which was by itself a demonstration that the light at the scene was not sufficient.

Next counsel posited that the prosecution failed to prove its case beyond reasonable doubt; that the appellant had a plausible *alibi*; that there were contradictions and inconsistencies in the prosecution's evidence especially on how many times the deceased was shot, how many guns the suspect had and the number of bulbs at the scene.

These inconsistencies, in counsel's view, were material; and that an honest witness or witnesses like PW1 and PW3 may be mistaken. For these submissions, counsel relied on the cases of **Mary Wanjiku Gichira vs. Republic**, Nairobi Criminal Appeal No. 17 of 1998, **James Tinega Omwenga vs. Republic** [2014] eKLR and **Wamunga vs. Republic** (1989) KLR 424.

Ms. Ngalyuka, learned counsel for the respondent opposed the appeal. She submitted that there was sufficient evidence of identification by PW1 and PW3; that the scene was well lit; that there was a close distance between the witnesses and the appellant; that the attack took 4 minutes which was ample time for the witnesses to see the appellant and to identify him in the parade; and that the defence of *alibi* was properly considered and rejected. In the result, counsel concluded, murder was proved beyond reasonable doubt and that the contradictions, (if any), did not weaken the prosecution's case; and that failure to call some witnesses was not fatal as the evidence against the appellant was overwhelming.

This is a first appeal from the judgment of the High Court. By dint of **Section 379** of the Criminal Procedure Code and in accordance with the decisions such as **Okeno vs. Republic** [1972] EA 32, this Court is expected to subject the entire evidence to a fresh examination.

This appeal turns on one issue: whether the prosecution proved the case of murder against the appellant beyond reasonable doubt. This issue will entail answering the question; whether the appellant was identified as the person who inflicted the fatal injuries and if so, whether he had the requisite malice aforethought.

We start by observing that the incident took place at night between 7.30 and 8.00pm; that the deceased was accosted by two men, one of whom was armed with a gun; and that he was shot dead by the gunman. The only witnesses who claimed to have seen and identified the gunman were PW1 and PW3. The two conceded that prior to the night in question, the appellant was not known to them. It is too common factor that the appellant was not arrested at the scene and the murder weapon was not recovered.

It is critical to state also that it took the witnesses three months after the attack to identify the appellant in an identification parade. It follows that the entire prosecution case depended on the accuracy of identification of the appellant by PW1 and PW3. How then were they able to identify the appellant in those circumstances?

The nature of lighting at the scene was established to be electric light from as many as estimated 20 bulbs outside the bar. This made the scene bright and with it the witnesses saw the gunman and his confederate well. The distance between PW1 and the gunman was 3 – 4 meters, watching from the 1st floor of the building, which gave him a good vantage point to see what was happening below him. PW3 was the closest to the gunman being only 2 -3 meters away from him. Both PW1 and PW3 were in close proximity to the gunman. PW1 estimated

that the incident lasted for about 4 minutes, while PW3 put it at no less than 5 minutes.

PW3, like PW1 insisted that he clearly saw the appellant who was the gunman and that at one point his eyes locked with that of the appellant. He also witnessed the gunman and his accomplice flee the scene on foot. He, however, followed them up to the point where they hijacked a *matatu* and escaped from the scene.

Both witnesses gave to the police a description of the appellant, with PW3 describing him as a medium, tall, brown slim, young man in his twenties. He also described what he wore, a cream jacket and green shorts, while PW1 stated that he was brown, had a white jacket and a farmer's hat. The descriptions were given to the police on 3rd April, 2005, a day after the incident. The appellant and his accomplice were finally arrested on 18th July, 2005, nearly 3 months later.

The learned trial Judge, having the advantage of seeing and hearing the two witnesses formed the opinion that they were credible and believed their testimony.

With respect, we are persuaded, from the totality of the evidence of identification that the witnesses had the opportunity and sufficient light to have a permanent impression of the appellant. PW3 had an extra reason to be keen in his observation; it was his own father who was under attack.

The two witnesses independently identified the appellant in an identification parade as the gunman who pulled the trigger on the deceased. To fault the Judge at this point for not finding that the identification parade was not conducted in conformity with chapter 46 of the Force Standing Orders, is against the advice in **Japheth Mwambire Mbitha vs. R** [2019] eKLR that only issues raised and determined by the trial or first appellate court can be raised on first or second appeal, as the case may be. The issue of irregular parade has been raised for the first time in this appeal.

The *alibi* defence by the appellant was properly considered and rejected by the trial Judge as the prosecution led evidence that squarely placed the appellant at the scene on the material night and his *alibi* did not create doubt in the prosecution's case.

Lastly, on the prosecution's failure to call crucial witnesses such as onlookers who could also have assisted in the identification of the gunman, it must be noted that in criminal cases the prosecution is required to avail only those witnesses whose testimony will be relevant to the matter under inquiry.

In any case, there is no legal requirement in law on the number of witnesses to prove a fact. See **section 143** of Evidence Act and **Keter vs. Republic** [2007] 1 EA 135.

Ultimately, having thus re-evaluated the evidence on record, we are of the view that there was overwhelming evidence upon which the learned trial Judge could rely on to reach the decision of identification.

Going by the medical report on the cause of death, we entertain no doubt that the appellant intended to kill the deceased. Malice aforethought was proved.

This appeal has no merit and we, accordingly, dismiss it in its entirety.

Dated and delivered at Nairobi this 6th day of November, 2020.

W. OUKO, (P)

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JUDGE OF APPEAL

A.K. MURGOR

…….……..

JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR