IN THE COURT OF APPEAL

AT NAIROBI

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

CRIMINAL APPEAL NO. 12 OF 2017

BETWEEN

JULIUS MACHARIA MURIUKI.....1ST APPELLANT

BONIFACE MWAURA NJOGU.....2ND APPELLANT

AND

REPUBLIC .....RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Nairobi (Ombija, J.) dated 19th March, 2015

in

H.C.CR.C No. 54 OF 2010)

****

JUDGMENT OF THE COURT

The two appellants were both jointly found guilty and convicted of the murder of the deceased, Bernard Bari Mwangi, contrary to **section 203** as read with **section 204** of the Penal Code. Upon that conviction, the 1st appellant was sentenced to suffer death while the 2nd appellant, being a minor at the time of the commission of the offence, was detained at the President's pleasure according to **section 25(2)** of the Penal Code.

When the consolidated appeal came up for hearing, the appeal by the 2nd appellant was withdrawn as he had been released on 3rd October, 2019 by the High Court *(Mativo, J.)* in **H.C Petition No. 250 of 2017**. Consequently, the appeal before us for determination is that by the 1st appellant.

The facts of the prosecution's case are that the appellant and Mary Muriithi (PW2) were in a come-we-stay relationship and had separated. Lucy Wairimu (PW1), on the other hand, was also in a relationship with the deceased. On 30th June, 2010, the appellant visited Wagikuyu bar within Kayole, peeped inside the bar and saw PW2, his ex-girlfriend in the company of PW1 and Murangeri (PW4). Later, the deceased joined the three and they continued their merry making.

At around midnight, PW1 and PW2, who lived together, left for their house. Shortly thereafter, the deceased called PW1 on phone and asked her to go over and spend the night at his house. Later, he went to PW1's house to collect her as his house was about 100 meters from that of PW1 and PW2. As they approached the deceased's house, the appellant suddenly appeared behind the deceased and held him. The deceased screamed as PW1 watched the appellant stab the deceased. She crossed the road to seek help from the neighbours. On seeing this, the 2nd appellant followed her and stabbed her five times sending her to the ground. In the process, she lost consciousness. When she came to, she was at Kenyatta National Hospital and later learned that the deceased had succumbed to the injuries and died.

PW1 stated that she knew the appellant as he had been her customer at Wakaruku bar and that he had been in a relationship with her friend, PW2; that she was able to identify him during the attack by his physical appearance and the clothes he had worn earlier that night when she saw him peeping into the bar; and that she had even called him by name as he stabbed the deceased. She also knew the 2nd appellant as he was always in the company of the 1st appellant. She was able to name both of them to the police at the first opportunity. It was therefore the prosecution's case that it was the 1st and 2nd appellants that caused the death of the deceased.

In his defence, the 1st appellant stated that he was a casual worker and that on the material day, he went to look for a job at Kangundo road; that he was referred to a foreman who told him to wait for him at Wagikuyu bar in Kayole; that he arrived at the bar at around 8.30pm, looked around for the foreman but did not find him; that he found his ex-girlfriend (PW2) who was in the company of PW1 and PW4; that he did not enter the bar but only stood by the door; that by 9.00pm after failing to locate the foreman he went home; that the next day at around 7.30 – 8.00pm a person he only referred to as Wachira visited him and briefed him about theft of charcoal that had taken place at Kayole the previous night. Wachira and his companions of about 5 men told him to accompany them to Kayole Police Station to record a statement since the suspects were his friends. Instead, he was placed in custody without any identification parade being conducted.

On 17th July, 2010 the OCS Kayole came to the cell where he was confined and informed him that he was a suspect in another case which he did not disclose. On the same day, he was taken to Kenyatta National Hospital by the investigating officer. It was while at the hospital that PW1 came with the police who frog marched him to a waiting Land-rover, where, for the first time, he was told him that he was a suspect in the incident of stabbing PW1 and her boyfriend; and that the latter had passed on; that he was in the company of the 2nd appellant when the offence was committed; that he was held incommunicado for 4 days; and that subsequently, he was arraigned in court for the offence of murder, which he denied.

No purpose will be served to summarize the 2nd appellant's statement in defence in view of the fact that his appeal is not before us.

The trial court *(Ombija, J.)* considered that the question of identification of the suspects was paramount and observed that:

> **"Against that backdrop of evidence, it is clear as day light, that there was electric lamp at the scene. Hence, PW1 was able to identify [Macharia and Mwaura] the assailants positively. In a nutshell visibility was not a problem. On the one hand Lucy (PW1) had earlier on seen Macharia at Wagikuyu Bar, just before the attack, and identified him with the clothes he was wearing just before the incident. Accordingly, the identity of Macharia cannot be in doubt".**

In addition, the learned Judge found that the 1st appellant admitted being in the company of the 2nd appellant on the day material to the matters under review in this appeal at Wagikuyu Bar; that being known to PW1, PW2 and PW4, the watchman at the bar, the appellants were identified, indeed, recognized positively. In the circumstances, they argued that there was no need to hold a police identification parade. After rejecting the appellants' defence, the learned Judge, accordingly found as a matter of fact that the appellants were at the scene and indeed stabbed the deceased causing his death; that the two acted in concert to prosecute an illegal purpose which prematurely ended the deceased's life. The appellants were convicted and as earlier stated, the 1st appellant was sentenced to death and the 2nd appellant detained at the President's pleasure.

Aggrieved by this decision, the 1st appellant now brings this appeal on 6 grounds which were summarized in the arguments before us as follows: That the learned Judge erred by relying solely on the evidence of PW1; failed to note that there was no common intention between the appellants; failed to evaluate and analyze the 1st appellant's defence of *alibi*; erred by concluding that the prosecution's case was proved beyond reasonable doubt; and that he erred by sentencing the appellant to death when the nature of such a sentence has been declared unconstitutional.

Before us, Mr. Amutallah, learned counsel for the appellant presented these grounds to us stating that the learned Judge relied solely on PW1's evidence when it was not safe as the attack took place at night at 12.30 pm; that PW1 was stabbed 5 times, lost consciousness and considering her evidence that her intestines came out, no reliance ought to have been placed on her evidence; and that the deceased and PW1 had been drinking and that therefore, PW1 was not in the right frame of mind.

Counsel further argued that, though PW1 said that she recognized the appellants, it is a known phenomenon that a person may be honest in thinking that he or she has recognized a person known to him or her and still be mistaken; and that PW1 did not describe the clothes that the 1st appellant was wearing.

Counsel urged us to find that it was erroneous for the Judge to dismiss the appellant's defence of *alibi* that he had been arrested in connection with another offence of stealing charcoal and not the offence of murder and also to agree with the 1st appellant's *alibi* because no explanation was proffered for his arrest 2 weeks after the incident yet the witnesses claimed to have known him before the incident.

Lastly, on the evaluation of the evidence, it was submitted that, contrary to the finding by the Judge, there was no love triangle in the matter involving the appellant and PW1 but rather PW1 was a girlfriend to the deceased.

Drawing on the now famous case of **Francis Karioko Muruatetu** & **another vs. Republic** [2017] eKLR, counsel urged the Court to be persuaded to reduce the appellant's sentence.

Ms. Ngalyuka, learned counsel for the respondent, opposed the appeal and maintained that the appellant's conviction was safe as it was based on PW1's evidence of recognition; that she had known the appellant two weeks prior to the material date since he had been a customer at the bar where she worked; that on the night in question, she remembered him from the clothes he had worn; that when the appellant stabbed the deceased, she asked him why he was doing that and even called him by his name "Macharia"; that the circumstances of identification were ideal as there was light at the scene and PW1 saw the appellant getting hold of the deceased; and lastly, she submitted that there were no mitigating factors to warrant the application of the **Muruatetu** Case (supra).

Being a first appeal from the judgment of the High Court, by **Section 379 (1)(a)** of the Criminal Procedure Code, this Court's jurisdiction is stated to include considerations of grounds of law or fact, or of mixed law and fact. This, in turn, enjoins the Court to subject the entire evidence to a fresh examination, so as to arrive at its own independent conclusions but bearing in mind that, unlike the trial court, it lacked the advantage of seeing and hearing the witnesses. See **Okeno vs. Republic** (1972) E.A. 32.

From the record of appeal and the submissions by parties, the single issue for determination is whether the prosecution proved the elements of the offence of murder beyond reasonable doubt.

To prove a charge of murder, the prosecution has a duty to establish three elements: the death and cause of death of the deceased (*actus reus*); that the accused caused the death through an unlawful act or omission; and that the accused possessed the intention to cause grievous harm or kill or had malice aforethought (*mens rea*).

The prosecution called a total of 10 witnesses. Out of these 10, the prosecution anchored its case on the evidence of PW1 who witnessed the actual occurrence of the incident. While at Wagikuyu bar in the company of PW2 and PW4 drinking, PW1 saw the appellant peep twice into the bar. She had known him previously as a customer at Wakaruku Bar where she worked. She also knew the appellant as the ex-boyfriend of PW2. The deceased joined the three and they continued to drink until around midnight when PW1 and PW2 left for their house. It was conceded by the 1st appellant that he visited the bar on that night and infact saw the three. Subsequently, the attack occurred as the deceased and PW1 were walking towards the former's house. PW1 witnessed the attack and described it by stating that the appellant was holding and stabbing deceased as the latter screamed. Because she knew the appellant, she called him by his name "Macharia" and asked him why he was harming the deceased. As PW1 ran across the road to get help from the neighbours, she too was stabbed by the 2nd appellant and lost consciousness at that point.

No doubt, from this evidence PW1 was the only eyewitness. Such evidence, respecting visual identification or recognition, according to this Court in **Abdala bin Wendo & Another vs. R.** (1953) 20 EACA 166, **Cleophas Otieno Wamunga vs. R** (1989) eKLR and **Paul Etole & Reuben Ombima vs. R,** (2001) eKLR, and several other decisions, must be received with the greatest care, especially when the conditions favouring a correct identification are acknowledged to be difficult. In such situations, a court ought to scrutinize the circumstances in which the identification by the witness came to be made.

The evidence of PW1 was that of recognition of the appellants being people well known to her as they were her customers. The 1st appellant was also known to her as the ex-boyfriend of PW2. In addition, she identified him by the clothes he was wearing earlier when he came to the bar prior to the attack.

With respect, we cannot agree with Mr. Amutallah's assertion that PW1 may have been honest but mistaken as to the identity of the appellant or that PW1 may not have been in the right frame of mind to identify the appellant as she had been drinking that night, slept shortly before leaving with the deceased and also due to excruciating pain following the stabbing in the stomach exposing her intestines. It is common factor that though this incident took place at night, the conditions of lighting were found by PW1 and PW7 to have been favourable as there were electric lights at the scene sufficient enough to enable her to identify the appellant and his confederate.

We are further satisfied that the appellant was well known to PW1. Indeed, PW1 had even called him by his name during the attack and asked him why he was causing harm to the deceased. After the incident and while hospitalized, PW1 was able to name their assailants to the police. Further, the injuries suffered by the deceased, according to post mortem report, was consistent with PW1's account that the appellant stabbed the deceased.

Based on these facts, we are satisfied beyond any doubt that the appellant's hand was involved in the death of the deceased. The circumstances prevailing on the material night were conducive as there were electric lights at the scene and; the identification was that of recognition. Nothing has been presented to us to reverse the trial court's finding on identification by way of recognition of the appellant. As was stated by this Court in **Anjononi & Others vs. Republic** (1976-80) 1 KLR 1566 at pg. 1568 that:

> **"Recognition of an assailant is more satisfactory, more assuring and more reliable…"**

It was therefore undoubtedly that the appellant caused the death of the deceased through an unlawful act.

Did the prosecution prove malice aforethought? The inculpatory facts were that the appellant stabbed the deceased while he was walking home in the company of PW1. There is no evidence at all of there being any disagreement or prior confrontation between the deceased and the appellant, yet the attack was vicious.

Because of the nature of the attack, where both the appellants appeared to have armed themselves with knives and concentrated their attacks on the abdominal area of their victims, we arrive at the conclusion that in the circumstances, *mens rea* for murder was also proved beyond any reasonable doubt.

Accordingly, the appeal against conviction is set aside.

On sentence, we were urged to consider the decision in **Muruatetu** (supra) case and substitute the sentence of death with any other suitable sentence. Though the attack was vicious, we consider the appellant's age, only 23 years at the time the offence was committed a relevant factor in considering whether death sentence was the most appropriate punishment.

We, in the circumstances, set aside the death sentence and substitute it with a sentence to imprisonment of 25 years from the date of conviction. The appeal on sentence therefore succeeds to that extent.

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

W. OUKO, (P)

……..

JUDGE OF APPEAL

A.K. MURGOR

…….

JUDGE OF APPEAL

S. ole KANTAI

……

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR