IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E. M. GITHINJI, HANNAH OKWENGU & J. MOHAMMED, JJ.A.)

CRIMINAL APPEAL NO. 100 OF 2016

BETWEEN

FRANCIS FAYA OCHIENG.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Eldoret* (Ngenye Macharia, JJ.*) dated 16th July, 2014

in

HCCR NO. 43 OF 2008)

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JUDGMENT OF THE COURT

[1] Francis Faya Ochieng, who is the appellant before us was tried and convicted by the High Court sitting in Eldoret for the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code.** It was alleged that on 29th November, 2008, he murdered **Mutua Musyoka**. The trial of the appellant was initially conducted by Azangalala J (as he then was), who heard the evidence of thirteen prosecution witnesses after which the prosecution closed its case. Thereafter, the trial was taken over by (Ngenye-Macharia J) who explained the appellant's rights under section 200 of the Criminal Procedure Code, and the appellant opted to have the hearing proceed from where Azangalala J had left it. The appellant was put on his defence and he gave a sworn statement and called no witness.

[2] The evidence that was adduced by the prosecution was as follows. On the 29th November, 2008, at about 5pm, Jackline Jepkoech (Jackline), was at the house of **Anjeline Lihavi Makani (Anjeline),** where Anjeline was selling chang'aa. Shortly thereafter, the appellant arrived at the house together with **Kenneth Odide Awino (Kenneth)**, Kenneth bought some alcohol which the appellant took with Jackline. They then moved to a bar where they continued drinking beer. At about 9.00p.m., Jackline left the bar and went back to her house where she found her husband Mutua Musyoka (deceased) and her son **Brian Kibet (Brian).** Later while they were asleep, at about 11.00p.m., the appellant broke into the house and demanded his mobile phone from Jackline alleging that she had stolen the same from the bar. Jackline denied having stolen the mobile phone and the appellant who was armed with a panga cut the deceased with the panga and the deceased ran out of the house. The appellant then turned on Jackline and also cut her on the ears, shoulder and back. Jackline and her son sought refuge at the house of **Asha Chelangat Abubakar (Asha),** where they spent the night. Jackline explained to Asha that they had been attacked by thugs. Later she named her attackers as the appellant and one **Ostin**. In the meantime, **Pamela Cheruto (Pamela),** a cousin to Jackline met the appellant at the house of Anjeline, and the appellant said to Pamela, "I have cut your sister and her husband." On 30th December, 2008, **Cpl. Evans Kipsang** who was on patrol duty found the deceased lying by the roadside. He took the deceased who had three deep cut wounds to Moi Teaching & Referral Hospital where the deceased later died. Jackline reported the assault to Yamumbi police post on 2nd December, 2008 and Sgt. Augustine Kisambi proceeded to her house and observed that there was blood on the floor. Subsequently **Dr. Walter Wekesa Nyalwenya** a pathologist, conducted a post mortem examination on the body of the deceased and formed the opinion that the deceased died as a result of head injuries caused by blunt and sharp objects. On 5th of December, 2008, the appellant and seven other persons were arrested for being drunk and disorderly. It was then realized that the appellant was required for the offence of murder, and he was handed over to Yamumbi police post.

[3] The appellant gave a sworn statement in which he denied killing the deceased. He explained that he accompanied his uncle, that is, Kenneth whom he referred to as Odede to the Brotherhood Bar where his uncle bought him drinks and later left. About 30 minutes later, he discovered that his mobile phone was missing. He learnt from the barman that two women one of whom was Jackline had taken the mobile phone. The appellant went to his uncle's house and informed him about the mobile phone, and they proceeded back to the bar where the

barman confirmed what he had earlier told the appellant. The appellant's uncle left the appellant and went to look for the mobile phone. The uncle came back in the company of one Augustine Ochieng, and informed the appellant that his mobile phone had already been sold and the money used to buy foodstuffs. The uncle and Augustine again went to follow up on the issue of the mobile phone but came back about an hour later and reported that they had found a man inside the house of Jackline and had fought with the man. The appellant's defence was generally that the uncle and Augustine were the ones who fought with the deceased. The appellant denied that his name was Odede and maintained that he was not involved in the death of the deceased.

[4] The learned judge upon considering the evidence of the prosecution and the appellant's defence, found the appellant guilty, convicted him of the offence of murder, and sentenced him to death. The appellant lodged an appeal against the judgment of the High Court, citing nine grounds in which he contended that the findings of the learned judge were not supported by the evidence adduced; that the learned judge disregarded the evidence of crucial witnesses and relied on contradictory evidence; and that the learned judge improperly rejected his defence. The appellant also filed supplementary grounds of appeal in which he faulted the learned judge for accepting written submissions and convicting him without evidence of an identification parade.

[5] During the hearing of the appeal, **Mr. Miyienda**, learned counsel who appeared for the appellant, submitted that the prosecution did not prove that the appellant was positively identified as the person who assaulted the deceased; that the evidence showed that the two people who went to the house of Jackline were Odede and Augustine; that the circumstances were such that Jackline could not have made a reliable identification, because the lights were off and she was drunk; that the evidence of Brian was not consistent with that of Jackline regarding the time of the incident, the presence of lights and the number of people who entered the house.

[6] In addition, Mr. Miyienda submitted that the evidence of Jackline was not reliable, as she reported to Asha that she was attacked by thugs, and only gave the names much later on; that there were material witnesses who were not called to testify, such as Augustine Ochieng and the police officer who collected the body of the deceased; and that Kenneth was not a reliable witness as he was adversely mentioned. Counsel urged that the learned judge was wrong in accepting written submissions as the practice was not anchored on the law.

[7] In regard to the sentence, Mr. Miyienda, argued that the sentence that was imposed upon the appellant was not lawful as there was no exercise of discretion as posited in the recent Supreme Court decision (presumably **Francis Karioko Muruatetu & another vs Republic & 5 others [2017] eKLR**. Counsel urged the Court if inclined to dismiss the appeal, to set aside the sentence of death imposed upon the appellant, and exercise its discretion in imposing an appropriate sentence.

[8] Mr. Mulati, Senior Prosecuting Counsel, who appeared for the respondent, opposed the appeal contending that there was clear evidence against the appellant; that the evidence of Brian was consistent with that of Jackline; that Cheruto testified that the appellant admitted to him that he had cut Jackline and her husband. Mr. Mulati argued that although there were some discrepancies regarding the date that did not affect the evidence regarding who assaulted the deceased. He therefore urged the Court to dismiss the appeal.

[9] We have considered this appeal and the submissions made before us. This being a first appeal, this Court is obliged to subject the evidence that was adduced before the trial court to a fresh and exhaustive examination, in order to come to its own conclusion (**Okeno vs Republic [1972] EA 32**). However, in doing so, the court has to bear in mind that the trial judge had the advantage of seeing and assessing the demenour of the witnesses and therefore must defer to the findings of facts made by the trial judge, unless the findings are not supported by evidence. In addition, the charge against the appellant being one of murder, the prosecution must prove both the *actus reus* and the *mens rea* by showing that the deceased died as a result of an act or omission on the part of the appellant, and that the appellant had the necessary *mens rea* to cause the death of the deceased.

[10] Section 206 of the **Penal Code,** states that:

> ***"Malice aforethought shall be deemed to be established by proving any one or more of the following circumstances –***
>
> ***a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;***
>
> ***b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;***
>
> ***c) an intend to commit a felony;***
>
> ***d) an intention by that act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony."***

[11] There was evidence that the deceased was found on the 30th December, 2008, lying by the roadside at about 1.00a.m, and that he had three deep cut wounds on the head. The autopsy results showed that he died shortly thereafter from severe head injuries. The question is therefore, who caused these injuries to the deceased and did he/she have the necessary *mens rea* to cause the death of the deceased.

[12] The evidence implicating the appellant was basically that of Jackline and Brian, both of whom testified that the appellant cut the deceased with a panga. There was also the evidence of Pamela, to whom the appellant allegedly informed that he had cut Jackline and her husband.

[13] In **Wamunga v Republic, 1989 eKLR 424** this Court held: that where the only evidence implicating an accused, is evidence of identification or recognition, a trial court has the obligation to examine such evidence carefully and to be satisfied that the circumstances of

identification were favourable and free from possibility of error, before it can safely make it the basis of a conviction. It is therefore important that we closely examine the evidence of identification and recognition in regard to the appellant.

[14] Jackline testified that she had been drinking with the appellant and his colleague from about 5p.m. to around 9p.m. when she went back to her house. She had barely slept when she was rudely awakened up from her sleep when the door to her house was broken wide open and a man entered asking for his mobile phone claiming that she had stolen it during the drinking spree. Jackline swore that the person who entered the house was the appellant. She concedes that it was dark, but maintains that she was able to identify the voice of the appellant.

[15] Surprisingly, when Jackline went to the house of Asha, from whom she sought refuge for the night, she did not inform her that she was attacked by the appellant, but said that she was attacked by thugs. It is only later that Jackline gave the names of the attackers to Asha as Odede and Augustine. This raises a doubt as to whether Jackline had really recognized her attackers as she claimed. We find that the trial judge erred in failing to address this crucial inconsistency that raised a serious doubt concerning the identification of the appellant by Jackline.

[16] In addition, Brian's evidence was not consistent with that of Jackline. For instance, unlike Jackline who claimed that the appellant broke into the house, Brian claimed that the door was knocked, and that it was Jackline who opened the door. Another material contradiction related to Jackline's evidence that it was dark, and that she was only able to identify the appellant by his voice. Brian claimed that there was a small tin lamp through which he was able to see the appellant and Ostin. In our view, the evidence of Brian that he recognized the appellant and Ostin is not credible for two reasons. First, because of the inconsistency regarding the presence of the light in the room. Secondly, because there was no evidence that Brian knew the appellant well enough to be able to recognize him physically under the stressful circumstances in which he was. In any case, Brian gave unsworn evidence and his evidence cannot be acted on without corroboration. In the light of the inconsistency between the evidence of Jackline and Brian, the evidence of Brian was not helpful at all, nor was it corroborated by the evidence of Jackline.

[17] Coming to the evidence of Pamela, she claimed to have found the appellant outside the house of Anjeline on 30th November, 2008, and that the appellant informed her that he had cut Jackline and her husband and then insisted on taking her to Jackline's house. Pamela's evidence is however inconsistent with that of Jackline, who claimed that Pamela came to her house on the day she was attacked at 11.00p.m., and that she found the appellant and Augustine still outside. The question then is, on which date did the appellant meet with and inform Pamela about assaulting the deceased, and where did they meet?

[18] From the above, the evidence implicating the appellant as the deceased's assailant was not one that can be said to be water tight, nor, would it be safe to rely upon it to found a conviction. As was stated in the old case of **R vs Eira Sebwata [1960] EA 174,** where the evidence alleged to implicate the accused person is entirely of identification, that evidence must be absolutely water tight to justify a conviction. Moreover, against this unsatisfactory evidence of identification, is the appellant's sworn evidence in which he denied having assaulted the deceased and implicated Kenneth. The fact that Augustine was not called to testify, left a gap in the prosecution case and a possibility that either Augustine or Kenneth could have been involved in the murder.

[19] For the above reasons, we find that there was doubt in the prosecution case, the benefit of which ought to have been given to the appellant. In the circumstances we allow this appeal, set aside the appellant's conviction and substitute thereto an order for the appellant to be released unless otherwise lawfully held. This judgment has been delivered under **Rule 32(2)** of the **Court of Appeal Rules.**

DATED and delivered at Eldoret this 4th day of April, 2019

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this s

a true copy of the original.

DEPUTY REGISTRAR