IN THE COURT OF APPEAL

AT MALINDI

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.)

CRIMINAL APPEAL NO. 27 OF 2016

BETWEEN

SAFARI YAA BAYA.....……...…APPELLANT

AND

REPUBLIC……...…….…….RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Malindi (Omondi, J.) dated 9th February, 2012

in

H.C.CR.C. No. 15 of 2007)

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JUDGMENT OF THE COURT

Katana Baya Yaa (*PW 1*) is the father to the appellant while the deceased was the appellant's grandmother and therefore mother to PW 1. On 9th September, 2007 at about midnight, PW 1 was asleep alone inside his house when he was startled from his sleep by a stranger calling him out while standing next to his bed. When he responded, the stranger in a fit of frenzy viciously attacked him by cutting him twice on the left knee, on the arm severally until it was severed and finally on the ear and back and left him for dead, bleeding profusely. Blood was flowing all over his face. However, before the assailant left and despite the harrowing experience he had been put through, PW 1 was able to recognize the assailant as his last born son, the appellant. He did so by recognition of his voice when he called him out and secondly by appearance because he stood next to his bed during the attack.

When the appellant left, PW 1 managed to drag himself to the door and watched as the appellant walked towards the deceased's house. He then saw the appellant enter the house, attack and cut the deceased severally using the same axe as she lay in bed. Done, the appellant left and the deceased came out crying. Her cries alerted neighbours who came to the scene among them **Mariam Tondo** (*PW 2*), the appellant's mother and **Daniel Ngumbo Karisa** (*PW 3*) a village elder. On getting to the scene, they found PW 1 seriously injured and deceased lying on the ground dead. PW 3 contacted the area chief who in turn contacted police officers at Malindi Police Station and reported the incident. As **PC Alfred Charo** (*PW 6*) in the company of other police officers were preparing to proceed to the scene, the deceased and PW 1 were brought to the police station by members of the public. PW 6 escorted the body

of the deceased to Malindi District Hospital Mortuary and caused PW 1 to be admitted at Malindi District Hospital in a serious but stable condition. He was informed that the person responsible for the death of the deceased and the near fatal injuries inflicted upon PW 1 was none other than the appellant.

PW 6 then instructed police officers attached to Marereni Police Patrol Base to pursue and arrest the appellant who had been spotted in Majengo area. Led by **PC Sammy Ndwiga** (*PW 5*), the police officers proceeded to Majengo and upon arrival the appellant was pointed out to them and they arrested him and recovered the axe suspected to have been used in the attack on the deceased and PW 1. The appellant was escorted to Malindi Police Station pending further investigations.

In the meantime, on 12th September, 2007, **Dr. Ali Hussein** conducted a postmortem on the body of the deceased and noted cut wounds on the head, compound fracture on frontal region as well as the vortex. There was also intra cerebral hemorrhage. He opined that the cause of death was head injury-intracerebral bleeding. The postmortem report was tendered in evidence on his behalf by **Dr. Beryl Kandia** (**PW 7**).

Investigations into the incident were spearheaded by **C.I.P, Thomas Kimuyu** (*PW 8*) with the assistance of PW 6. During the investigation, they established that the relationship between the appellant and PW 1 was tumultuous. At some point PW 1 had accused the appellant of stealing the title deed to the family land and caused his arrest by police officers from Marereni Police Patrol Base but was soon thereafter released without any charges being preferred against him. Convinced that they had the prime suspect in the murder of the deceased in their custody, the appellant was on 2nd October, 2007 presented before the High Court at Malindi on an information charging him with the offence of murder contrary to **Section 203** as read with **Section 204** of the Penal Code. The particulars were that on 9th September, 2007 at Majengo Village, Fundisha Location of Malindi District, Coast Province, he murdered, **Dama Jefa Baya**.

The appellant denied the charge and thereafter his trial ensued. The evidence tendered by the prosecution was along the lines already outlined above. Put on his defence the appellant elected to remain silent and called no witnesses. **Omondi, J**. upon evaluating the evidence was persuaded by the prosecution case and accordingly found the appellant guilty, convicted and sentenced him to death. Aggrieved by the decision, the appellant has lodged his appeal before us.

The appellant had initially in his home drawn memorandum of appeal raised five grounds of appeal. However, when **Ms Otieno**, learned counsel was appointed to represent him; she filed supplementary grounds of appeal in which she raised six grounds. However, at the hearing of the appeal she condensed them into three; that the evidence of voice recognition was unsafe to found a conviction; there were material inconsistencies and contradictions in the prosecution case that should have been resolved in favour of the appellant, and lastly, the inordinate delay in prosecuting and determining the appellant's case infringed on his right to a fair and speedy trial.

Prosecuting the appeal, Ms Otieno submitted that though the trial court relied on voice recognition to found the appellant's conviction, the circumstances obtaining at the scene of crime were not favourable for such recognition. That from the evidence, the incident occurred on a dark night, that PW 1 was sleeping in his house when he was rudely woken up allegedly by the appellant who proceeded to cut him viciously. He was bleeding and at some point, he even fell down from his bed. At this point, the deceased was suffering serious trauma with blood covering his face according to counsel. That in the circumstances the word "***Baba***" which the appellant is alleged to have uttered and which enabled PW 1 to recognize the voice as that of the appellant was not sufficient. Further PW 1 did not indicate what had assisted him to see the appellant since it was dark, and did not at all allude to any presence of light. Accordingly, and in those circumstances, the alleged voice recognition cannot be said to have been safe and free from possibility of error. For this proposition, counsel referred us to the case of **Duncan Muchui v Republic [2013] eKLR**.

On inconsistencies and contradictions in the prosecution's case, counsel submitted that the witnesses were not sure of the number of houses in PW 1's compound, whether they were two, three or even four. The witnesses also did not agree on whether the appellant was at home at the time of commission of the

offence. Similarly, they were not in agreement as to whether a grudge existed between the appellant, PW 1 and the deceased. Because of these contradictions, counsel submitted that the prosecution case against the appellant was watered down and further that those contradictions and inconsistences ought to have been resolved in favour of the appellant.

On the question of the delay in the prosecution of the appellant, counsel submitted that the appellant was arrested on 10th September, 2007. That his plea was not taken until a year later following a lawyers' strike in relation to the Chief Justice's circular requiring that all judicial review applications be filed in the Central Registry of the High Court at Nairobi. That the appellant's trial did not commence until 28th July, 2010 and was only concluded on 9th February, 2012. To the appellant, this inordinate delay in finalizing his trial infringed on his right to a speedy and fair trial. On that basis alone, counsel urged that the appellant ought therefore to be discharged. In support of this submission, counsel referred us to the decision of this Court in **Charo Karisa Salimu v Republic [2016] eKLR**.

Opposing the appeal, **Mr. Fedha**, learned Senior Prosecution Counsel submitted that the circumstances of voice recognition were favourable. That PW 1 being the appellant's father could not have failed to recognize his son's voice. That apart from voice recognition, PW 1 had also seen and visually identified the appellant at the scene. That the evidence of PW 2 corroborated the evidence of PW 1. In the premises, the circumstances obtaining at the scene of crime were favourable for positive voice recognition of the appellant. Counsel further submitted that there was a grudge between the appellant and PW 1 which was the impetus for the appellant's actions. On the question of fair trial, counsel submitted that this was not the proper forum to raise such complaint. In any event, counsel submitted the appellant had raised the issue before the trial court and was directed to file a petition in that regard. He did so but for reasons best known to himself, he subsequently withdrew it. In the premises, counsel submitted that the appellant cannot now purport to raise the issue again.

This being a first appeal, this Court is under duty to re-evaluate and re-analyse the facts and evidence which resulted in the decision of the trial court and reach its own independent decision on the same. As stated in the case of **Okeno v Republic [1972] E.A. 32**:-

> **"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v R [1957] EA 336) and to the appellate court's own decision on the evidence.** ***The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala vs. R. [1975] EA 57). 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 draw its own conclusions. Only then can it decide whether the magistrate's findings 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.*** *See* ***Peters v Sunday Post [1958] EA 429."***

We have carefully considered the record of appeal, the respective submissions of learned counsel and the law. It is common ground that the conviction of the appellant turned on voice recognition, the trial court having disavowed or discounted the evidence of visual identification of the appellant by PW 1 on the grounds that since the offence occurred at "*midnight with no source of light, there is no way PW 1 could have seen the person who attacked him….*" We cannot agree more with this conclusion by the trial court.

With regard to voice recognition, it has been stated time without number that voice identification is just as good as visual identification. However, just like visual identification, care has to be taken to ensure that the voice was that of the appellant, that the person testifying as to the voice recognition was familiar with the voice and recognized it, the conditions prevailing at the time of the recognition were favourable and it should also be borne in mind that voices may at times resemble. See **Karani v R [1985] KLR 290** and **Choge v R [1985] KLR 1**. In the latter case, this Court delivered itself thus on the issue:

> **"……There can be no doubt that the evidence of voice identification is receivable and admissible in evidence and that it can, depending on the circumstances carry as much weight as visual identification, since it would be identification by recognition rather than at first**

sight. In Rosemary Njeri v Republic [1977] Criminal App. No. 27, a victim of the offence of grievous harm testified she heard the appellant say '*break her legs*'. The reception of this evidence was upheld in the High Court on the first appeal and also on the second appeal in which this Court said:-

"Mr. Otieno has submitted that identification by voice is less satisfactory than visual identification. In our view, it can be equally safe and free from error, more so if the identification takes place at night. We agree with the two lower courts that in the particular circumstances of this case, the appellant and the complainant being familiar with each other for many years, the possibility of error was excluded."

More recently in Simon Mbelle v Republic, in which Mr. Etyang was quick to point out that only two words '*ni mimi*' (*it is me*), sufficed as regards voice identification, we said (1 KAR 578 at 583):

"In relation to the identification by voice, care would obviously be necessary to ensure (a) that it was the accused person's voice (b) that the witness was familiar with it and recognized it and (c) that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who said it. In the instant case, we are satisfied, on our own evaluation, as we have indicated, that the reception of the evidence as to the voice identification and the dying declaration was correct and safe."

In the instant case however, the trial court did not make a definitive finding that PW 1 actually recognized the appellant by his voice. If anything, the trial court confused voice identification with circumstantial evidence. The learned judge appears also to have used the alleged prevailing grudge between the appellant and PW 1 to infer that PW 1 must then have recognized the appellant's voice.

This is how the learned judge delivered herself on the issue:-

"……..The case of Karani v R. [1985] KLR pg 280 held that identification by voice is recognized but pointed out that care has to be taken to ensure that the voice recognized was that of the suspect. I also recognize, as was observed in the decision of Choge v R [1985] KLR that voices may resemble, but in this instance, <u>the voice was accompanied by actions consistent with source which had made his intentions known in the past and it cannot be a coincidence that the targets were PW 1 and the deceased- just like accused had always warned…….so having taken into account the hostility that existed between accused, PW 1 and by same reasons the deceased, the threats made by accused towards his father (PW 1) and the deceased, and the subsequent attack on both PW 1 and PW 2 on the same night- is there any other reasonable explanation as to who else would have wanted to finish off PW 1 and deceased? I find none. The evidence inculpably points to the guilt of the accused and no one else</u>……..."(Emphasis provided)

There are serious misdirections on the part of the trial court in this excerpt. First, the case as presented by the prosecution was one of recognition, both visual and by voice. It was not one of circumstantial evidence. Secondly, there was no evidence of any hostility between the appellant and the deceased, and thirdly, the appellant though it is alleged was the perpetrator of the crime, did not on the same night attack PW2. PW 2 who is the appellant's mother testified and did not allude at all to having been attacked by the appellant.

The learned judge seems to have been carried away by the alleged grudge between the appellant and PW 1 and the alleged threats to kill PW 1 allegedly issued by the appellant previously. The trial court did not for once consider the hatred PW 1 had towards the appellant for one, having separated him from his wife (PW 2), for whom he had put up a house far away from PW 1, disagreement over land, the genesis being PW 1 having sold a portion thereof without the involvement of the family and the fact that at some point PW 1 had caused the appellant to be arrested by police and locked up. Could this not have pushed PW 1 to falsely testify against the appellant? Further, if the disagreement was between the appellant and his father, why would he take it out on his grandmother? There is also the evidence of PW2 exonerating the

appellant from the commission of the offence. PW 2 testified that the appellant was not at home at the time of the alleged offence. He was away at Kurawa where he used to work. PW 3 also confirmed this in his evidence. The prosecution did not attempt to discredit this evidence at all. Nor did the prosecution apply to have PW 2 and PW 3 declared hostile witnesses in view of their alleged departure from their recorded statements. Since their evidence was never challenged, it created a doubt as to whether or not the appellant was at the scene as alleged and therefore the voice recognition.

Then there was the evidence of PW 1's alleged involvement in sorcery. According to PW 2, on the fateful day, PW 1 had come from consulting a witchdoctor where he had spent 3 days. There was further evidence that previously some leaflets had been thrown in PW 1's compound warning him of dire consequences due to his activities. PW 4 in her testimony corroborated the evidence of PW 2 regarding the leaflets. Infact she went further and testified that besides her father, there was also another person who was mentioned in the leaflets for the very same reason. That other person was subsequently attacked in circumstances similar to those of PW 1 and killed. It was not claimed by the prosecution that the person who attacked the other person suspected of sorcery was the appellant. Given the foregoing, is it possible that PW 1 recognized the voice of another person and attributed or pinned it to the appellant? Is it also possible that the person (s) who killed the other suspect were the same people who could have killed the deceased? This possibility cannot be wholly ruled out.

PW 1's own evidence regarding how he recognised the appellant's voice is telling. This is how he testified in examination in chief:-

> **"It was about 12.00 a.m. (midnight) when the accused came and cut me while I slept inside my house I was asleep on my bed when he attacked me. I was alone in the house because accused had snatched away my wife from me and built her a house away from me …….Accused called out my name, I stirred up and then he called me again and I responded, then he begun cutting me. I know his voice so well, I brought him up and cannot mistake his voice. He called me as he stood next to my bed……."**

From the foregoing, it is apparent that PW 1 does not state the exact words used by the appellant as he called him out that would have enabled him recognize his voice. It is also apparent that he was startled from his sleep and in pitch darkness. He must have been traumatized, making voice recognition doubtful considering the difficult circumstances. However, in cross-examination and as a star prosecution witness, he claimed that the appellant called him "*Baba*" and that he called him once. This is diametrically opposed to what he said in examination in chief; in which he stated that he was called by name twice. He also testified that despite having seriously been assaulted to the point where his arm was severed, with blood flowing all over his face and in total darkness he was still able to do the following; see the appellant, the colour of the scarf he had wrapped around his head and the cap, the object used to cut him, drag himself to the door and see the appellant cut the deceased as she lay in her bed inside her bedroom and then rush to alert the neighbours about 300 metres away. How is this possible? It is simply unbelievable and incredible. In our view, his evidence ought to have been treated with caution given the strained relationship between the appellant and PW 1. Given again the near impossibility of the actions attributed to PW 1 above, it may lend credence to the appellant's submissions that PW 1 was falsely connecting him to the death of the deceased to merely settle scores. After all, he is on record as saying that the appellant "*is a terrible person. I do not love the accused, he destroyed me physically…*"

On our own assessment and re-evaluation of the voice recognition evidence, we are satisfied that it was of the weakest kind and should not therefore have been used to found a conviction. The prevailing circumstances at the scene, did not at all favour positive voice recognition. In view of this conclusion, we do not need to consider the other grounds of appeal.

Accordingly, we allow the appeal, quash the conviction and set aside the sentence of death passed on the appellant. He should be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Malindi this 31st day of March, 2017

ASIKE- MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

…….…...

JUDGE OF APPEAL

K. M'INOTI

……...

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR