IN THE COURT OF APPEAL

AT NYERI

(CORAM: WAKI, NAMBUYE & KIAGE, JJ.A)

CRIMINAL APPEAL NO. 24 OF 2015

BETWEEN

RICHARD MBAABU ITHALIE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from a conviction and sentence of the High Court

of Kenya at Meru (Lesiit, J) dated 12th November, 2014

in

H. C. Cr. C. No. 98 of 2009

****

JUDGMENT OF THE COURT

1. The appellant herein was tried and convicted by the High Court sitting in Meru **(Lesiit, J.)** for the offence of murder contrary to ***section 203*** as read with ***section 204*** of the **Penal Code** and was sentenced to death. It was alleged in the Information filed by the Attorney General at the time, that on the 6th day of August, 2008, at Naathu location of Igembe District, he murdered David Mwiti **(deceased).** The evidence considered by the trial court came from eight witnesses including the appellant who gave sworn testimony.

2. As this is a first appeal, *the appellant is entitled to expect the evidence tendered before the trial court to be subjected to a fresh and exhaustive examination and to have this Court's decision on that evidence. Necessary allowance should however be given that this Court, unlike the trial court, did not have the advantage of seeing or hearing the witnesses. See* ***Okeno vs Republic*** *(1972) E. A 32 and* ***Mwangi vs Republic*** *(2006) 2 KLR 28. In the case of David Njuguna Wairimu vs Republic (2010) eKLR* this Court reiterated this duty and pronounced itself as hereunder:-

> "***The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower***

court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision."

It is on those principles that we approach the appeal.

3. The deceased was the appellant's uncle. The deceased's father owned a *miraa shamba* adjacent to which was another *miraa shamba* rented out to **Joseph Kobia M'Mutia (PW1),** a *miraa* trader. Joseph had known the deceased's father, the deceased, the appellant and other members of the family since 2002 when he rented the adjacent *shamba*. At about 10 a.m on 6th August, 2008, Joseph was at his *miraa shamba* when he saw the deceased also checking on his father's *miraa.* Shortly thereafter, the appellant came to the *shamba* holding a *panga* and started chasing the deceased. The deceased fell down and was cut twice on the head by the appellant. The appellant then removed a mobile phone from the deceased's pocket and also removed and took the deceased's jacket. Joseph was about 7 meters away when he witnessed all this.

4. The appellant ran away as Joseph screamed hard attracting the attention of the deceased's brother, **Julius Karuti (PW5), Isaac Kiliungu M'Mwiko (PW3)** and others who came to the scene. He immediately told them it was the appellant who cut the deceased with a *panga*. They rushed the deceased to Maua Methodist Hospital for treatment as he was still alive. Later they went to Mutuate Police Station and reported the incident.

5. The investigating officer, **PC Erick Lucheli (PW 6)** attempted to record a statement from the deceased as he lay in hospital but he was in a coma. He took statements from other witnesses and issued a warrant for the arrest of the appellant. On 22nd August, the appellant was arrested and charged before Maua Chief Magistrate's Court (CMCR 2613 of 2008) with the holding charge of assault contrary to ***section 251*** of the **Penal Code** pending the recovery of the deceased. According to **Evangeline Kaburu (PW7),** the executive officer in Maua law courts who produced the court file, the appellant was discharged on that offence on 30th December, 2008 under ***section 89 (5)*** of the **Criminal Procedure Code** (CPC).

6. On 1st November, 2008, the deceased died whilst undergoing treatment. A post mortem report carried out on 11th November, 2008 confirmed that he had died from cardio respiratory arrest due to severe head injury following trauma. The head had a skull fracture on the occipital region approximately 7 cm with absent skull bone on an area 3x5cm. The appellant was rearrested and charged with the offence of murder on 29th December, 2009 when he appeared in court and the plea was set for 21st January, 2010. He denied the offence and the trial ensued.

7. In his sworn testimony, the appellant said he was a farmer and *miraa* dealer before his arrest. He denied having harmed his uncle as narrated by Joseph (PW1) and instead gave an *alibi* account of where he was on that day. He woke up at 6 a.m and went to his *miraa shamba* where he plucked out some *miraa* worth Sh. 500 which was enough for his family that day. He returned home at 12 noon and found his child had fallen sick. He gave his wife the Sh. 500 to take the child to hospital. He also found his mother there who informed him that his grandfather had told her that his three uncles (the deceased, Julius (PW5), and Joseph Kobia) had fought. He went to the grandfather and confirmed the story. Thereafter he went to Maua Methodist Hospital where the deceased was admitted but the deceased could not talk. On his way out he met Julius who warned him never to visit the deceased again and he never did. He was arrested on 22nd August, 2008 but was released on 30th December, 2008 only to be arrested again on 16th December, 2009 to face a charge of murder.

8. In cross examination, the appellant stated that it took him between 6 a.m and 11 a.m to pluck two bundles of *miraa*. He Knew Joseph very well because he was a member of his extended family but they had a boundary dispute. He did not see Joseph on the material day but had seen him the previous day with the deceased. According to him, Joseph lied in his evidence because there were other people at the scene but he was the only one who purported to have seen him commit the offence. He could not recall what transpired in court when he was charged with the offence of assault but he was set free after about

five months. He insisted that he respected his uncle like his father and could not have harmed him.

9. After evaluating the entire evidence, the trial court believed the sole eye witness account of Joseph as well as the medical evidence supporting the gravity of the injuries inflicted on the deceased and convicted the appellant accordingly. The court rejected an objection raised by counsel for the appellant that the prosecution was unlawful because the appellant had already faced another trial based on the same facts and it was a bar to subsequent proceedings. The court also rejected the submission that there was no motive proved for the alleged murder, since motive is immaterial so far as regards criminal liability **(*section 9 (3)*, Penal Code.)**

10. Aggrieved by those findings the appellant drew up a memorandum of appeal in person raising 10 grounds. Legal counsel was subsequently provided to him in the person of **Mr. Mutegi Mugambi** but he did not file any amended or supplementary memorandum. Instead, he abandoned some grounds and consolidated others, in the end urging two grounds which we may summarize:

> ***(i)The learned Judge erred in convicting the appellant on the uncorroborated evidence of a single witness on identification.***
>
> ***(ii)The learned Judge erred in finding that the unconditional discharge of the appellant was not a bar to further prosecution.***

11. In urging the first ground of appeal, Mr. Mugambi submitted that the sole evidence of Joseph was unreliable and should not have been believed without the court examining the prevailing conditions favouring positive identification. In his view, it was not possible for Joseph to identify anyone in a *shamba* full of *miraa* trees. On the basis of the evidence that other people came to the scene but did not witness the offence or identify the appellant, counsel submitted that a reasonable doubt arose which could only have been removed by corroborative evidence but none was adduced. He relied on the case of ***Peter Mwangi Mungai vs Republic* *[2002] eKLR*** where this Court, in a robbery with violence case based on the uncorroborated visual identification evidence of a single witness, stated that the evidence must be tested with the greatest care before conviction is entered. Some of the tests were: whether the witness had made a report as to whether he could identify the accused and given a description; whether he was able to identify the accused in an identification parade; and whether the factors stated in the case of ***R. vs Turnbull* *[1976] 3 ALL ER 549*** were examined.

12. The factors are:

> ***"How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, e.g by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by him and the accused's actual appearance?"***

13. On the 2nd ground, counsel referred to ***section 89 (5)*** of the **CPC** under which the appellant was ostensibly discharged of the charge of assault and submitted that the unconditional discharge was a bar to any further prosecution. No authority was cited for that profound submission.

14. Responding to those submissions, learned Senior Assistant Director of Public Prosecutions **Mr. E. O. Onderi** submitted that the evidence of the single witness on identification was free from error. That is because it was made in broad daylight at 10 a.m; the witness was only 7 meters away; the witness clearly saw two *panga* cuts being inflicted on the head of the deceased after a chase; and the witness was not a stranger to the appellant. The postmortem report supported the cuts at the back of the head and the gravity of the cuts established malice aforethought, he added.

As for the discharge of the appellant, counsel submitted that a discharge is not an acquittal and therefore

the appellant could not plead the doctrine of *autrefois acquit.*

15. We have carefully considered the two grounds of appeal which were also raised before the trial court. We shall first examine the legal issue raised that the discharge of the appellant was a bar to further prosecution.

16. There are clear provisions in ***section 138*** of the CPC that a person who has been once tried by a court of competent jurisdiction for an offence and convicted or acquitted of that offence shall, while the conviction or acquittal has not been reversed or set aside, not be liable to be tried again on the same facts or for the same offence. The principle in French is *'autrefois convict'* or *'autrefois acquit'* which literally means *'previously convicted or acquitted.* It is a rule against double jeopardy and there was a constitutional backing for it in ***section 75 (5)*** of the **retired Constitution**, which provided thus:

> *"No person who shows that he has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial of that offence, save upon the order of a superior court in the course of appeal or review proceedings relating to the conviction or acquittal."*

17. There are also clear provisions under ***section 87 (a)*** of the CPC that *a public prosecutor may, with the consent of the court or on the instructions of the Director of Public Prosecutions, at any time before judgment is pronounced, withdraw from the prosecution of any person, and if it is made before the accused person is called upon to make his defence, he shall be discharged, but the discharge shall not operate as a bar to subsequent proceedings against him on account of the same facts.*

18. The discharge of the appellant in this case was not made under any of the above provisions of the law but under ***section 89 (5)*** *of the CPC which provides as follows:*

> ***"Where the magistrate is of the opinion that a complaint or formal charge made or presented under this section does not disclose an offence, the magistrate shall make an order refusing to admit the complaint or formal charge and shall record his reasons for the order."***

19. The view taken by the appellant before the trial court, as he did before us, is that upon the refusal by the trial magistrate to admit the charge sheet laid before him which resulted in the discharge of the appellant from further appearance in court, he cannot be prosecuted again for any offence arising from the same facts. The trial court dealt with the issue as follows:-

> ***"The effect of that finding of rejection of the charge is that the accused named in the charge has no charge facing him. Such an accused stands discharged for lack of any charge against him. In the circumstances, such a discharge cannot be a bar to future arrest and charge against the accused, as the charge preferred against him was rejected by the court. The preferred charge ceased to exist the moment the magistrate made the pronouncement rejecting the charge. In the circumstances I reject the defence argument that the discharge pronounced by the lower court should be a bar to the current charge against the accused. Nothing turns on this ground."***

20. With respect, we think the construction placed on ***section 89 (5)*** by the trial court was correct. For the discharge of an accused to operate as a bar to subsequent trial on the same facts, there must have been a trial of an accused, that is, a hearing and determination on the merits by a court of competent jurisdiction. It is not contended by the appellant that he went through any trial on the charge of assault. On the contrary, it was in evidence from the court file in **CMCr Case No. 2613 of 2008** that he was discharged before any trial took place after rejection of the charge sheet by the trial magistrate. A person is said to be discharged when he is relieved from the legal proceeding by an order which does not amount to a judgment. There is no conviction or acquittal. A person who is in law only discharged may be charged again for the same offence if some other evidence is discovered against him. The discharge leaves the matter at large for all purposes of judicial inquiry and there is nothing to prevent a court discharging an accused from inquiring again into the case. In this matter, the deceased died several months after his assault and there was nothing to prevent the court from entertaining the charge of murder as it did. We

reject that ground of appeal.

21. The other ground of appeal is on identification by a single witness. Generally, identification remains an indispensable element in any criminal trial. In ***Cleophas Otieno Wamunga vs Republic* (1989) KLR 424**, this Court stated as follows:-

> ***"Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against the defendant depends wholly or to a great extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant on reliance on the correctness of the identification".***

22. That care becomes even more pronounced where the only evidence of identification is from a single witness, hence the emphasis by this Court in numerous past decisions for testing such evidence with the greatest care and applying the principles stated in the ***R. vs Turnbull case (supra)***. Even where the more reliable mode of identification is recognition, the caution made in the ***Turnbull case*** should be heeded, thus:

> ***"Recognition may be more reliable than identification of a stranger but even when the witness in purporting to recognize someone which he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made……..".***

23. In this case, the trial court was conscious of the need for careful scrutiny of identification evidence, and warning itself, before basing a conviction on it. It relied on dicta from the case of ***Abdullah Bin Wendo vs Rex 20 EACA 166*** that:

> ***"Subject to certain well known exceptions it is trite law that a fact may be proved by a testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt from which a Judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness can safely be accepted as free from the possibility of error."***

24. The court went further to examine factors that favoured positive identification and stated:

> ***"I considered that the incident occurred at 10am. It was in a shamba next to where PW1 was working. PW1 was a neighbor of the accused, the deceased and their families. The accused was therefore well known to PW1. There was no suggestions made that PW1 could have any motive to implicate the accused falsely with this serious offence and none was alleged by the defence..... I find that PW1 was an eye witness of the incident. I examined PW1 as he gave his evidence. He had a good demeanor and impressed me as an honest witness. There was nothing to suggest that he was implicating the accused falsely. I find PW1 was honest. He witnessed the incident at 10am, in broad day light. In addition to PW1's evidence, PW3 followed by PW5 also heard the screams and went to the scene in that order. They found PW1 screaming. PW1 told them that it was the accused that attacked and cut the deceased. Even though PW1 was the sole eye witness of this incident, I find the evidence of PW3 and 5 gave credence to his evidence that PW1 initial report the moment he had an opportunity to make it was to implicate the accused for the offence."***

25. We have re examined the record ourselves and find no error in the approach adopted by the trial court as it accorded with the above principle. There is no law that requires a multiplicity of witnesses to prove a fact. ***Section 143*** of the **Evidence Act** is clear on that. Apart from the factors that favoured positive identification as stated by the trial court, which we agree with, the veracity of the evidence of the single identification witness turned on his credibility which the trial court expressly evaluated. We have no

reason to fault that evaluation having not heard the witness. There is also a measure of comfort in relying on the evidence of the single witness who stated, and the appellant acknowledged, that he was well known to him. As was stated by this Court in the case of ***Anjononi & Others vs Republic*** ***(1976-80) 1 KLR 1566,*** at page 1568,

> ***"This was, however a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends on the personal knowledge of the assailant in some form or another."***

26. The *alibi* touted by the appellant, which he had no duty to prove, was clearly displaced by the prosecution evidence and his defence was properly rejected. Malice aforethought was established by the gravity of the injuries inflicted on the deceased and the case of ***Morris Alouch vs Republic - Cr. Appeal No. 47 of 1996 (UR)*** was properly applied. It stated:-

> ***"If repeated blows inflicted the injury then malice aforethought could well be presumed but in this case we have to contend with one single blow which caused perforation of the intestine which led to internal bleeding which did not become apparent until the death of the deceased some four days later."***

The deceased was felled by two *panga* blows and cuts on the back of his head which fractured the skull and defied successful treatment. The intention was to cause death or grievous harm.

27. We find no merit in this appeal and we order that it be and is hereby dismissed.

Dated and delivered at Meru this 10th day of October, 2017.

P. N. WAKI

.....

JUDGE OF APPEAL

R. N. NAMBUYE

.....

JUDGE OF APPEAL

P. O. KIAGE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR