



IN THE COURT OF APPEAL

AT NYERI

(SITTING AT MERU)

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

CRIMINAL APPEAL NO. 41 OF 2016

BETWEEN

STEPHEN MWITI APPELLANT

AND

REPUBLICRESPONDENT

(Appeal from a judgment of the High Court of Kenya at Meru (Lesiit J.) dated 5th June, 2014

in

HC. CR. CASE NO. 58 OF 2011)

JUDGMENT OF THE COURT

By this appeal the appellant **Stephen Mwiti** (Mwiti) challenges his conviction and sentence of death imposed on him by the High Court at Meru (Lesiit, J) for the murder on 5th October 2011 of **Peter Gitonga** (Peter) at Antombocio Location in Igembe South District within Meru County.

The evidence led by the prosecution, and which the learned Judge believed, was that on the material day at about 8pm, Peter got home and had supper with his wife of two years Pamela (PW4) before stepping out of the house. Moments later, she had him say **“Pamela, I have been stabbed by Mwiti”**. She took a torch and stepped out of the house. Flashing the torch, she saw Peter lying on the ground bleeding from the ribs and standing by was Mwiti, whom she knew well, holding a blood-dripping sword. At this she screamed and Mwiti ran away. Her screams attracted neighbours who came and Peter was taken by vehicle to Maua District Hospital where he was admitted. He once again addressed Pamela; “My wife, it is Mwiti who has stabbed me.” She went home later that night but on returning to the hospital the next day, she found Peter dead.

When the villagers of Antombocio learnt of Peter’s death they mobilized, tracked Mwiti down and found him hiding in a toilet at the home of one Erastus Mbaabu where he was employed. The villagers who included Peter’s brother, **Fredrick Mutwiri Paul (PW1)**, apprehended Mwiti and took him to the Maua Police Station where he was re-arrested and detained before being charged with Peter’s murder. Upon a

post-mortem examination of the body, Dr. **Thiakumu Mwirabua (PW1)** observed a stab wound on the left side of the chest measuring 4 by 2 by 10cm between the 10th and 11th ribs with a collapsed left lung with laceration and a pierced stomach. He formed the opinion that the probable cause of death was “hypovolemic shock” with blood in the pleural cavity due to a single stab wound involving the spleen and left lung.

When placed on his defence, Mwiti gave sworn testimony in which he stated that on the material night he left his place of work at about 8pn. As he walked along he met 5 people who ordered him to stop because they were police officers. After he complied, they asked him for money. One of them brandished a knife before taking some Kshs. 130 which Mwiti had. They started beating him and as he wrestled with them he snatched a knife from one of them and stabbed him with it but Mwiti did not know who he was as he had a “monkey face” mask on. Mwiti thereafter ran off before going to report the incident to the police the next day, only to be arrested.

Mwiti stated that he knew Peter well as a village mate of over five years. He also confirmed knowing Pamela quite well.

The grounds on which Mwiti challenges his conviction and sentence are the two contained in the supplementary memorandum of appeal filed by the firm of Kimathi Kibiti & Co. Advocates on 20th March 2017, namely that the learned Judge erred by;

- ***Failing to appreciate the law as it pertains to the evidence of identification and recognition.***
- ***Failing to address the contention that the appellant’s identification by a single witness occasioned a miscarriage of justice.***

At the hearing of the appeal, learned counsel for the appellant **Mr. Kibiti** attempted to cast doubt on Pamela’s recognition of Mwiti considering that she was unable to note or recall the clothes he was wearing at the time. He added that this was compounded by the fact that Pamela was an only witness and even then not one of the actual event. She is said to have come out after Peter had already been stabbed and her identification/recognition of Mwiti was poor as the circumstances were not conducive to positive error-free recognition.

For the Republic, the learned Senior Assistant Director of Public Prosecutions **Mr. Onderi** contended that Mwiti was properly identified at the scene. Priscilla saw him clearly. This was buttressed by Mwiti’s own evidence that he did stab someone that night. Counsel added that Mwiti’s conduct in going to hide in a toilet where he was found went to confirm his guilty mind which Mr. Kibiti, in his rejoinder, contested by stating that the mere fact of hiding in the toilet did not show that Mwiti was guilty of the crime.

As this is a first appeal, we have gone through the evidence as was adduced before the learned Judge and captured on the record. We have done so in a fresh and exhaustive manner re-analyzing and re-evaluating it though mindful that we did not have the advantage the learned Judge had of hearing and observing the witnesses as they testified. We accordingly make allowance for that and give due respect to the findings of fact arrived at, departing only if they are based on no evidence, are based on a misapprehension of the evidence or are plainly wrong. This Court has spoken of this approach, which an appellant is entitled to expect and demand of a first appellate court, in many decisions. See for instance, **OKENO vs. REPUBLIC, [1972] E.A 132.**

On the first ground raised, namely that the learned Judge failed to appreciate the law on the evidence of identification or recognition, we do not think that to have been the case. In fact, there seems to have been no doubt at all about the identity of the appellant because he himself did testify that he was at or near the scene and that he did stab someone though he appeared to suggest that he did so in self-defence. He did not challenge Pamela’s testimony with regard to his identification or recognition but buttressed it by stating that he knew her well. At any rate, even were it the case that recognition was an issue, Pamela’s testimony is that she came out and saw Mwiti standing over the deceased with a bloody sword. She shone the torch fully on Mwiti’s face and saw him well before he ran off upon her screaming. We think, therefore, that the evidence of recognition, which is more assuring and stronger than the evidence of

identification of a stranger, was sufficient to prove that Mwiti was the one who inflicted the mortal stab wound on Peter. Mwiti's own testimony that he did stab someone that night provides the necessary corroboration out of a necessary caution to avoid any possibility of injustice due to any error of identification as discussed in ***R vs. TURNBULL* [1976] 3 All ER P549**. We think that on the circumstances of this case there is no doubt that the prosecution did establish that Mwiti was Peter's stabber.

Further assurance, and which should dispose of the appellant's second complaint that there was miscarriage of justice due to reliance on the identification of a single evidence is provided by the dying declaration given by Peter to Priscilla. Such evidence is, in appropriate cases, not only admissible but of proper probative value. See ***CHOGE vs. REPUBLIC* [1985] KLR 1**. This is one such case Peter having in the extremity of expectation of imminent death named the culprit, and there being other supporting evidence besides. On two occasions Peter very clearly and categorically stated that it is Mwiti, who had stabbed him. This evidence was not challenged and we think that it adds to the weight of inculpatory evidence that led to the logical and inescapable conclusion that Peter met his death at the hands of Mwiti. Like the learned Judge we think that the stabbing was wholly unprovoked, its aim to kill or cause grievous harm and therefore constituting malice aforethought and that the conviction of the appellant for the murder was both justified and quite inevitable.

Our consideration of this appeal reveals that it is devoid of merit and we accordingly dismiss it.

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

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR