IN THE COURT OF APPEAL

AT MOMBASA

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

CRIMINAL APPEAL NO. 29 OF 2015

BETWEEN

PHILIP NZAKA WATU……..APPELLANT

AND

REPUBLIC……………….RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Mombasa, (Muya, J.) dated 12th March 2014 In H.C.CR.C. NO. 2 OF 2012)

JUDGMENT OF THE COURT

On 21st December 2011, four days shy of the Christmas Day festivities, ***David Chipolu (PW3)*** was seated outside a shop at ***Kasidi market, Rabai District*** of ***Kilifi County*** between 6.30 pm and 7.00 pm. The appellant, ***Philip Nzaka Watu***, who was known to PW3 and lived in the same neighbourhood, came along and greeted him. The deceased, ***Mwambu Chiruu Mwambui***, who was also their neighbour, shortly joined them. The deceased was dumb and used to communicate in sign language. He was married to ***Betty Chivizi Mwambui (PW2)*** for some 40 years and they had six children. It was PW2's evidence that after living with the deceased for so long, she easily communicated with and understood him very well.

Back at Kasidi Market, PW3 saw the appellant hold the deceased by the hand and the two walked away, a distance of about 15 to 20 feet from PW3, as though they were conferring privately. The next thing that PW3 saw was the deceased lying down, with his intestines protruding from the gut. There was no one else in the vicinity save for the appellant, PW3 and the deceased.

As the appellant made to flee, PW3 started shouting that the appellant had killed the deceased, accosted and restrained him. Immediately a crowd gathered, threatening to lynch the appellant. Ultimately the appellant was subdued and handed over to ***James Chiviva Ngao (PW4),*** a village elder who in turn surrendered him to the Chief, ***Elvis Hare Mwarandu (PW5)*** before he was eventually re-arrested by the police.

PW2 happened to be at the same market buying paraffin, when ***Josephine Mbeyu (PW1),*** a seller of porridge at the market, informed her that her husband had been killed. That was after PW1 had seen the deceased lying on the ground. PW2 rushed to the scene and found the deceased still on the ground with a stab wound in the abdomen and protruding intestines. He was still alive, and according to her testimony, he told her:

"Bye, I am going. I am dying because I have been stabbed. I have been stabbed by Nzaka."

PW2 tied a lesso round the deceased's body in a bid to contain and restrain the protruding intestines, but the deceased soon passed on and his body was collected by the police and taken to Coast Provincial General Hospital.

By an information dated 9th January 2012, the appellant was charged with the murder of the deceased contrary to ***section 203*** as read with ***section 204*** of the ***Penal Code***. He pleaded not guilty to the charge and was tried before ***Nzioka, J***. who heard the entire prosecution case and the defence. As the learned judge was unable to proceed with further hearing, the trial was taken over and concluded by ***Muya, J***. under ***section 201(2)*** of the ***Criminal Procedure Code***.

In addition to the evidence of the witnesses who we have referred to above, the prosecution also relied on the evidence of ***Dr. Lucyann Wahome (PW8)*** who performed a postmortem examination of the deceased at Coast Provincial General Hospital on 30th December 2011. Upon examining the body, the witness noted gut herniating through cut wound in the abdomen sub-umbilical region and a knife injury lateral to the lumbar spine, with the knife still in situ. She concluded that the cause of the death of the deceased was hemorrhagic shock due to gut injury due to penetrating abdominal injury caused by a sharp object.

Put on his defence, the appellant gave an unsworn statement in which he state that on the material day and time, he was on his way from work when he was confronted by youths demanding Kshs 200/- to buy palm wine. When he declined to give the money, he was assaulted before being arrested by the village elder and taken to the chief's office, after which he was charged with the murder of the deceased, which he knew nothing about.

On 12th March 2014, Muya, J. held that the prosecution had proved its case beyond reasonable doubt, convicted the appellant as charged and sentenced him to death. Aggrieved by the decision, the appellant preferred the first appeal now before us. The appellant's appeal is premised on three grounds, which impugn the judgment of the High Court in the following terms:

> ***"1. The learned judge erred in law and fact by failing to find that the offence of murder was not proved beyond reasonable doubt;***
>
> ***2. The learned trial judge erred in law and fact by admitting a statement that was not a dying declaration and without cautioning herself (sic) the danger of admitting such evidence; and***
>
> ***3. The learned judge erred in law by meting out a sentence that was extremely punitive, harsh and excessive without considering the circumstances surrounding the case."***

In presenting the appeal, ***Ms. Otieno,*** learned counsel for the appellant urged only grounds 1 and 2 of the appeal. On the first ground counsel submitted that the prosecution had not proved the offence of murder against the appellant beyond reasonable doubt because the evidence that was adduced was riddled with contradictions and inconsistencies. That evidence, counsel submitted, was also mere circumstantial and hearsay evidence as none of the witnesses had seen the appellant stab the deceased or in possession of the murder weapon. Counsel further submitted that there were discrepancies and contradictions regarding the time of commission of the offence, with some witnesses testifying that the offence was committed at 6.30 pm (PW1); 6.30 am (!) (PW2); between 7.30 and 8.00 pm (PW3) and 7. 00 pm (PW4). In counsel's views, these were fundamental discrepancies that cast doubt on the veracity of the prosecution case.

Turning to the second ground of appeal, counsel submitted that the deceased was dumb and could not speak. It was therefore doubtful how he could have made the alleged death declaration identifying the appellant as his assailant. Although PW2 had testified that she could effectively communicate with the deceased, counsel doubted that the deceased had identified the appellant, because at the time PW2 was communicating with the deceased, the appellant was not present at the scene. Relying on the decision of this Court in ***STEPHEN MUTURIA KINGANGA V. REPUBLIC, CR APP NO. 305 OF 2011 (NYERI)***, Ms. Otieno submitted that it is unsafe to found a conviction on a dying declaration which has not been

tested by cross-examination and that in the present appeal, the trial judge had not even warned himself of the danger of relying on a dying declaration.

On account of the foregoing, we were urged to find that the conviction of the appellant was unsafe and to allow the appeal, quash the conviction and set aside the sentence of death imposed by the trial court.

Mr. Jami Yamina, learned Principal Prosecution Counsel opposed the appeal contending that the appellant's conviction was sound and safe and the sentence lawful. On the dying declaration, it was submitted that from the entirety of the judgment, the trial judge was very alive to the danger of basing a conviction solely on a dying declaration and that he even cited the decisions of the former East Africa Court of Appeal in ***TARIKABI V. UGANDA [1975] EA 60*** and the Court of Appeal of Uganda in ***KATO V. UGANDA [2002] EA 101*** to the effect that evidence of a dying declaration should be received with caution.

Counsel further submitted that PW2's evidence of the dying declaration was credible; that the declaration was made when the deceased was facing imminent death; that having been communicating with the deceased for 40 years PW2 could understand the deceased; and that in any event the dying declaration was properly corroborated by the evidence of PW3 who saw the appellant with the deceased moments before the latter went down with a fatal stab wound.

On the contradictions in the evidence that the appellant alleged, Mr. Yamina submitted that the time given by the witnesses was reasonable estimate and that on the totality of the evidence, there was no doubt that the offence was committed between 6.30 pm and 7.00 pm. Relying on section 214(2) of the Criminal Procedure Code, counsel submitted that variance in time was immaterial and did not in this case affect the validity of the conviction.

In a first appeal, we are obliged to reappraise and re-evaluate the evidence and come to our own independent findings. (***KIILU & ANOTHER V. REPUBLIC [2005] KLR 174).*** While ordinarily the first appellate court will not interfere with conclusions of the trial court that are underpinned by the advantage of that court in seeing and hearing the witnesses testify, in this appeal Muya, J. unfortunately, did not enjoy any advantage over this Court because he had to render his judgment on the basis of evidence recorded exclusively by a different judge.

The first question in this appeal is whether the prosecution case was riddled with contradictions and inconsistencies of the magnitude that would make the conviction of the appellant unsafe. It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt.

However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognised in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.

In ***DICKSON ELIA NSAMBA SHAPWATA & ANOTHER V. THE REPUBLIC, CR. APP. NO. 92 OF 2007*** the Court of Appeal of Tanzania addressed the issue of discrepancies in evidence and concluded as follows, a view we respectfully adopt:

> ***"In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to***

> ***decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter."***

The main contradiction that the appellant complains about relates to the time when the offence was committed. The prosecution witnesses were clear that they were not testifying to the exact time. They were approximating, to the best of their abilities as common rural folk. The witnesses mentioned various times, ranging from 6.30 pm, 7.00 pm, 7.30 pm and 8 pm. The only exception was the evidence of PW1 where the time is recorded as 6.30 a.m. Granted the consistency of the estimates of the other witnesses, we cannot rule out the possibility that the reference to 6.30 a.m. was in fact a typographical error in the record. The trial court was satisfied that the offence was committed between 6.30 pm and 7.00 pm and we have no basis for concluding that there was material contradiction in the prosecution evidence to warrant interference with the conclusion of the trial court. In any case, the time when the offence was committed is a question of fact, which the two courts below determined.

The substantial question in this appeal relates to the dying declaration identifying the appellant as the deceased's assailant. The appellant submits that the dying declaration was never made and if it was, it amounted to hearsay evidence, which was inadmissible or was otherwise unreliable.

Decisions of this Court abound on admission and reliance on a dying declaration. Suffice to mention only two, ***CHOGE V. REPUBLIC [1985] KLR1, KIHARA V. REPUBLIC [1986] KLR 473*** and ***NELSON JULIUS KARANJA IRUNGU V. REPUBLIC, CR. APP. NO. 24 of 2008***. Under ***section 33(a)*** of the ***Evidence Act***, a dying declaration is admissible in evidence as an exception to the rule against admissibility of hearsay evidence. Under that provision, statements of admissible facts, oral or written, made by a person who is dead are admissible where the cause of his death is in question and those statements were made by him as to the cause of his death, or as to any of the circumstances of the transaction leading to his death. Such statements are admissible whether the person who made them was or was not expecting death when he made the statements. Clearly by reason of section 33 (a), there is no substance in the claim that a dying declaration constitutes inadmissible hearsay evidence.

Notwithstanding section 33(a) of the Evidence Act, courts have consistently held the view that evidence of a dying declaration must be admitted with caution because firstly, the dying declaration is not subject to the test of cross-examination and secondly, circumstances leading to the death of the deceased such as acts of violence, may have occasioned him confusion and surprise so as to render his perception questionable. While it is not a rule of law that a dying declaration must be corroborated to found a conviction, nevertheless the trial court must proceed with caution and to get the necessary assurance that a conviction founded on a death declaration is indeed safe. This Court expressed itself as follows in ***CHOGE V. REPUBLIC (supra):***

> ***"The general principle on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at a point of death and the mind is induced by the most powerful considerations to tell the truth. In Kenya, however the admissibility of dying declaration need not depend upon the declarant being, at the time of making it, in a hopeless expectation of eminent death. There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in reception into evidence of such declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person.***

The evidence of the dying declaration was given by PW2, who we have noted was married to the deceased for a period of forty years. This witness was firm that although the deceased was dumb, she could communicate with and understand the deceased very well, his speech impairment notwithstanding. In her words, before the deceased died, he told her:

> ***"Bye, I am going. I am dying because I have been stabbed. I have been stabbed by Nzaka."***

The declaration was specific enough to identify the appellant and the manner in which he had attacked the deceased, i.e. by stabbing him. The evidence of PW3 placed the appellant with the deceased at the *locus*

in quo. From the record, we are satisfied that the deceased disclosed to PW3 his assailant shortly before he expired.

The trial judge was clearly alive to the duty upon him to exercise caution before convicting the appellant on the basis of a dying declaration alone. The decisions of ***TARIKABI V. UGANDA*** ***(supra)*** and ***KATO V. UGANDA*** ***(supra),*** which he cited, reiterate the principle of caution in relying on a dying declaration. In addition to the dying declaration, we are satisfied that there was additional evidence corroborating the death declaration as held by the trial judge.

The evidence of PW3 was corroborative of the dying declaration. According to that witness, the appellant held the deceased by the hand as they walked about 15 to 20 feet from the witness as if to confer privately. In an instant, the deceased was stabbed and was on the ground with his intestines protruding. There was no one else in close proximity to the deceased except the appellant who moments earlier had led the deceased away by the hand. PW3 was well known to both the appellant and the deceased who were his neighbours. Moments before the deceased was stabbed, PW3 had been talking to both of them. The question of mistaken identity did not therefore arise.

While PW3 did not see the appellant actually stab the deceased, the evidence, which is circumstantial, points to the appellant, and to nobody else, as the deceased's assailant. We are satisfied that the evidence on record is incompatible with the innocence of the appellant and incapable of explanation by any other reasonable hypothesis except his guilt. In addition, there are no other co-existing circumstances, which would weaken or destroy the inference of guilt on the part of the appellant.

The attack on the deceased was rather quick and sudden because his assailant did not even have the time to retrieve the murder weapon from the body of the deceased. This fact is confirmed by the evidence of PW8 who testified that the murder weapon was still in situ in the body of the deceased when she conducted the postmortem nine days after the death of the deceased. In those circumstances, it is hardly surprising that PW3 did not see the actual stabbing of the deceased.

In ***STEPHEN MUTURIA KINGANGA V. REPUBLIC*** ***(supra),*** the deceased had made a dying declaration identifying the appellant as his assailant. There was no direct eyewitness to the appellant inflicting upon the deceased *panga* cuts from which the deceased later died. This Court held that the evidence of the first witness on the scene who saw the appellant wielding a *panga* and chasing the profusely bleeding deceased was sufficient corroboration of the dying declaration.

Another important piece of evidence in this appeal, which the trial court did not advert to, and which we find provides additional evidence of corroboration of the prosecution case is the conduct of the appellant immediately after stabbing the deceased. His initial reaction was to attempt to flee, forcing PW3 to accost and restrain him. The appellant's attempt to flee the scene is indicative of his guilty mind and may be relied upon as evidence that corroborates the prosecution case. (See ***BUKENYA PATRICK & ANOTHER V. UGANDA**, CR. APP. NO. 15 of 2001*, Supreme Court of Uganda).

Ultimately we are satisfied that this appeal is bereft of merit and the same is hereby dismissed in its entirety. It is so ordered.

Dated and delivered at Mombasa this 11th day of March 2016

ASIKE-MAKHANDIA

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