IN THE COURT OF APPEAL

AT NYERI

(SITTING AT MERU)

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

CRIMINAL APPEAL NO. 68 OF 2013

BETWEEN

SIMON NGOMORO ALIAS LOCHI ACHILON…….....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Meru (Lesit, J) dated 2nd February, 2012

IN

H.C.CR.A. NO. 9 OF 2009)

****

JUDGMENT OF THE COURT

The appellant **Simon Ngomolo** alias **Lochi Achilon** appeals against his conviction and the sentence of death imposed by the High Court at Meru (Lesiit J), given on 2nd February 2012 for the murder on 7th February 2008, of Marko Ebonyo (deceased) at Maili Tano in Isiolo District.

The prosecution case as mounted through nine witnesses was that on the material day at about 5 pm, the appellant and the deceased were walking along a village path quarrelling loudly. They walked in the direction of two friends **Peter Emuria Ater** (**Peter)** and **John Longeritoe (John**). All were very well known to each other physically, by name and nickname being neighbours in the village. Moreover, the appellant is Peter's cousin. As they approached each other the appellant suddenly made a grab for the knife that Peter wore on his waist, as appears to have been common in that village. A struggle ensued in which the appellant prevailed and took the knife. In the course of the struggle for the knife, Peter, the owner, got cut and sustained injuries to his hand which precipitated his letting go of it.

The appellant rushed back to where the deceased was standing and used that snatched knife to stab him, plunging the knife in the left chest, in the midline of the sternum. The knife penetrated 6 cm deep and into the heart leading to severe hemorrhage and cardiac injury. **Dr. Edalia** who performed the Post-

Mortem examination and prepared a report produced in evidence by **Dr. Kiluva** (PW 9) opined that the cause of death was the resultant cardio-pulmonary arrest.

Other than Peter and John, the prosecution called another eye-witness to the incident **Anyes Maima Ngoli** (PW1). She was an octogenarian with failing eyesight though, who had never seen the appellant before and whose dock identification of him was wholly wanting as she had to be taken very close to the dock in order to make out the appellant. The learned Judge described her evidence as being unreliable on that account and correctly so, in our view.

According to the Investigating Officer, Police Constable **Charles Ochieng** (PW7), the appellant went into hiding shortly after the fatal stabbing of the deceased. A brother of his gave information that he had ran away to Mulango area, some 60 kilometers or so from Isiolo Town. It was not until 19th January 2009, nearly a year later, that he was apprehended by **Simon Janis Sairi**, (PW5) among other guards at the Likurruki Wildlife Conservancy on suspicion of having stolen cattle. He was in the company of three other persons with whom he was taken to the Isiolo Police Station and re-arrested by **PC Charles Kaluki** (PW6) who, upon searching them, found knives on their persons.

The knife that the appellant had was later positively identified as the same one that he had snatched from Peter and used in the fatal stabbing of the deceased, by Peter himself and John as well. PW6 handed it over to the **Investigating Officer** (PW7) and it was later produced before the trial court as Exh.1.

At the close of the prosecution's case the appellant was found to have a case to answer and after **Section 306** of the **Criminal Procedure Code** was complied with, he elected to give sworn testimony and call one witness. His evidence was that even though he lived in Maili Tano, Isiolo District, he was not there on 7th February 2008 as he was away in Embu where he was employed by One **Ernest Mugo** (DW2) as a casual labourer at a shop the name of which he did not know, being illiterate. He denied any knowledge of the deceased, Peter or John and insisted that he was arrested and charged with an offence related to the theft of cattle and not murder and that he was not involved in the deceased's death. He also denied ever having gone to Mulango in Isiolo. DW2 testified that the appellant was and is his employee and that "***he did not leave work between March 2006 until January 2009".*** He was at work on 7th February 2008. The appellant's defence was therefore in the nature of the alibi but the learned Judge dismissed it in view of the prosecution's case which she considered to be ***"watertight."***

We have set out the evidence adduced before the trial court in some detail cognizant that as a first appellate court we are enjoined to subject the entire evidence to a fresh and exhaustive analysis and re-appraisal before drawing our own inferences of fact and making independent conclusions on the guilt or otherwise of the appellant. See **Rule 29(1)** of the **Court of Appeal Rules**; **OKENO –VS- REPUBLIC** [1972] EA 32 and **CHEMAGONG –VS- REPUBLIC** [1984] I KLR. 611. We do so mindful that we are dependent on the record entirely not having had the advantage enjoyed by the trial court of observing and hearing the witnesses so as to decide on their credibility.

The appellant initially filed a home-grown memorandum of appeal signed by himself but his learned counsel, **Miss Nelima** abandoned the grounds therein and relied on her filed Supplementary Memorandum of Appeal raising the following six grounds, the first having also been abandoned;

- ***The ingredients of the offence of Murder were not proved.***
- ***The post-mortem report was not signed.***
- ***The identification of the appellant was not proper.***
- ***The learned Judge relied on extraneous matters and advanced her own theory to convict the appellant.***
- ***The learned Judge failed to consider the appellant's*** *alibi* ***defence.***

Arguing the appeal, Miss Nelima contended that Peter and John did not

identify the appellant and that neither stated where exactly the appellant allegedly stabbed the deceased thus casting doubt on whether the appellant was the fatal assailant considering that he was arrested for

suspected stock theft and not murder. She then submitted that the post mortem report was not signed. To her, the writing of his name in capital letters did not amount to signing of the said Form by Dr. Edalia. She concluded by submitting that the appellant did have a solid *alibi* that he was away at work in Embu on the material day. It was enough for him to have raised that defence which he had no duty to prove, sufficing that it introduced a lot, unreasonable doubt in the court's mind as this Court held in **KIARIE –VS- REPUBLIC** [1984] I KLR 739.

On his part, **Mr. Musyoka** the learned Prosecution Counsel submitted that the appellant was properly identified and placed at the scene of the crime by two witnesses who knew him very well, including his cousin Peter. As to the ingredients of murder, he contended that the appellant's act of stabbing the deceased in the chest right where the heart is showed that he intended to cause death or grievous harm. He next discounted the appellant's complaint about the Post-Mortem Form on the basis that its maker did sign it. He finally urged that the appellant's *alibi* defence was an afterthought as he was placed by reliable testimony at the scene of the crime.

The first thing we shall dispose of is the Post-Mortem Form. Whereas the appellants ground of appeal is to the effect that the form was not signed as required, it is clear that the same is not blank. It does bear Dr. Adelia's name and his colleague PW9 did testify that it is Adelia who filled up the form and wrote his own name by way of signature. We are satisfied that the signature requirement was thereby satisfied for a signature is no more than a person's name written in a distinctive way as a form of identification or authorization (per the Concise Oxford English Dictionary, 12th Edn. 2011) or a person's name or mark written by that person or of the person's direction by way of authentication (per Black Law Dictionary, 9th Edn, 2009). It is noteworthy that at the trial, Counsel then appearing for the appellant, **Mr. Muchangi** is on record as having indicated that he had no objection to the production of the said report. We think therefore that nothing turns on this ground of appeal.

Regarding identification, the offence occurred in broad daylight in the open. The appellant approached Peter and John and snatched Peter's knife after a struggle in which Peter got injured. He then ran back to the deceased and stabbed him. He was 5 meters away from the two eye-witnesses who knew him very well. There was no possibility therefore, of error on the question of the eye-witnesses' recognition of the appellant as the assailant. It was also not challenged that upon his arrest nearly a year later, the appellant had on him the very knife he had snatched from Peter and used to stab the appellant. This confirms his having been at the scene and therefore also effectively exploded, dispelled and disposed of the *alibi* defence the appellant mounted.

We are satisfied on our own perusal and consideration of the record that the learned Judge approached the evidence of visual recognition with the requisite caution and circumspection and arrived at a logical and correct conclusion as follows;

> ***"I have warned myself of the special need for caution in receiving the evidence of facial identification by PW2 and 3. I have also borne in mind that the burden lies exclusively on the prosecution to prove its case against the accused beyond any reasonable doubt. I have also cautioned myself that even though the evidence of identification by the two eye witnesses was that of recognition, mistakes of identification are made even of close relatives.***
>
> ***I do find that PW2 and 3 knew the accused person very well for a long time and in the case of PW2 they were cousins. The two eye witnesses had close contact with the accused because he ran up to where they were and grabbed the knife which PW2 was carrying. It was at 5 pm and therefore during the day. There were no obstructions to visibility, and PW2 and 3 had a clear view of the accused. I am satisfied beyond any reasonable doubt that the evidence of recognition by PW2 and 3 was water tight as against the accused."***

The learned Judge also properly directed herself and complied with the guidance of this Court and its predecessor in such cases given in, among others, **REPUBLIC –VS- ERIA SEBWATO** [1960] EA 174 and **KIARIE –VS- REPUBLIC** (Supra) and **ETOLE & ANOR –VS- REPUBLI,** (CRIMINAL APPEAL NO. 24 OF 2000).

The learned Judge cannot also be faulted for finding that the fatal stabbing of the deceased by the appellant was of malice aforethought as defined by **Section 206** of the **Penal Code**. The blow was single but decisive. It was also massive and directed at the heart. It was calculated to cause death, or at the very least, grievous harm to the deceased, either of which amounted to malice aforethought. The appellant was clearly determined and resolute about inflicting that fatal injury given the length to which he went to run for, wrestle for and run with the knife to the deceased who, though carrying one of his own, did not even attempt to reach for, or use it. The attack by the appellant was therefore premeditated, intentional and unprovoked and in the eyes of the law it was Murder.

For all these reasons the learned Judge's analysis and conclusions were warranted and we see neither reason nor basis for interference. The appeal fails and is therefore dismissed.

Dated and delivered at Meru this 24th day of June, 2016.

P. N. WAKI

.....

JUDGE OF APPEAL

R. N. NAMBUYE

.....

JUDGE OF APPEAL

P.O. KIAGE

.....

JUDGE OF APPEAL