



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, MUSINGA & GATEMBU, JJ.A)

CRIMINAL APPEAL NO. 65 OF 2014

BETWEEN

JUSTUS MOREKWA MAKINI APPELLANT

VERSUS

REPUBLIC RESPONDENT

(An Appeal from a Judgment of the High Court of Kenya at Kisii, (R. Sitati, J.) dated 8th May, 2014

in H.C.CRA. NO. 39 OF 2008)

JUDGMENT OF THE COURT

1. The appellant, Justus Morekwa Makini, was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence were that on 13th September 2008 at Nyamache Trading Centre, in Gucha District of the then Nyanza Province, he murdered Japheth Nyabuto Makini. He was tried by the High Court of Kenya at Kisii, convicted and sentenced to death. He has appealed to this Court.

2. Appearing for the appellant, learned counsel, Mr. Z.Mokua, referred us to the memorandum of appeal and submitted that the offence was not proved to the required standard; that the learned Judge erred in basing the conviction solely on purported voice recognition of the appellant by PW3; that the evidence of that witness was full of contradictions; that the conviction is not sustainable without the crucial testimony of the investigating officer and the arresting officer who were not called to testify; that having entertained doubts regarding the prosecution case, the trial Judge should have acquitted the appellant.

3. On his part, Mr. E. Ketoo, learned Prosecution Counsel, opposed the appeal, submitting that the appellant was properly identified; that PW3 heard and identified the appellant's voice; that the appellant is well known to PW3 being a relative; that the injuries the deceased sustained corroborated the testimony of PW3; that even though the prosecution was denied an adjournment by the trial court in order to call the investigating officer, the evidence tendered by the prosecution was nonetheless sufficient to prove the offence to the required standard; that in accordance with section 206 of the Penal Code malice aforethought was established and the appeal should be dismissed.

4. We have considered the appeal and the submissions. This is a first appeal. Accordingly, our duty is to subject the evidence to fresh scrutiny and to draw our own conclusions bearing in mind that we have not heard or observed the witnesses ourselves. As the predecessor of this Court held in **Okeno vs. R [1972] EA 32 at p. 36:**

“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 vs. 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. [1957] E.A 570). 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 vs. Sunday Post [1958] EA 424.”

5. In **Joseph Kariuki Ndungu & another v Republic [2010] eKLR (Criminal Appeal Nos. 183 & 188 of 2006)** this Court stated:

“This being a first appeal, we have a duty to re-appraise the evidence, subject it to exhaustive examination and reach our own findings. We, however, appreciate that the trial judge had the advantage of seeing and hearing the witnesses. We further appreciate that because of that advantage, the trial judge is best equipped to assess the credibility of the witnesses and that it is a principle of law that an appellate court should not interfere with those findings by the trial court which are based on the credibility of the witnesses unless no reasonable tribunal could have made such findings or it is shown that there existed errors of law.”

6. What then was the evidence presented before the trial Court? The prosecution called three witnesses. Jackson Nyabuki (PW3) was 14 years old and was a pupil in standard 8 at Tendwet Primary School in Kericho when he testified before the High Court on 4th April 2011. Prior to his testimony, the trial court satisfied itself that PW3 understood the importance of an oath and the need to tell the truth.

7. In his evidence, PW3 recalled that on 13th September 2008 at about 11.00 pm, he was at home with his father, Japheth Nyabuto, the deceased. He was asleep in the sitting room when he heard a window in one of the bedrooms being broken. He heard the person who was outside, whose voice he recognized as that of his uncle, the appellant, hurl insults at his father saying that his father was going to die of AIDS. The appellant then went to the main door of the house and knocked thrice. PW3’s father, the deceased, came to the sitting room where PW3 was and then went out of the house with a panga. PW3 said that he was looking out of the window and saw the appellant struggling with his father; that he saw the appellant hit his father with an iron bar (tarimbo); that on seeing that PW3 feared for his life and ran away towards the river.

8. When PW3 returned to the scene about 5 minutes later the appellant was no longer there. He found his other uncles and aunties at the scene. The deceased was lying on the ground and called him (PW3) but did not say anything to him. The deceased had injuries all over his body and was bleeding from his head, ribs and right hand. He was taken to hospital where he died.

9. PW 3 was emphatic that he saw the appellant hitting the deceased with the iron bar, which was found abandoned in the shamba next to their house. He also saw, he said, the panga next to where the deceased was lying down. Although it was at night, he was categorical that there was “moonlight from half moon” that was “bright enough to enable [him] see far”.

10. Questioned by the court, PW3 maintained that there was enough moonlight that enabled him to see the appellant. He went ahead to describe the clothes that the appellant was wearing at the time. Under cross examination by counsel for the appellant, PW3 reiterated that he saw his father, the deceased, being hit with the iron bar on the right and that he fell down before he could do anything.

11. The deceased's younger brother, Franklin Marita Makini, (PW2) a primary school teacher, lived in close proximity to the deceased's house, about 100 meters from his house. He recalled that on 13th September 2008 at about midnight, he was asleep in his house when he heard screams. He got out of his house. The screams were coming from the appellant's house. He proceeded there and a few minutes from the appellant's door, he found the appellant lying down, bleeding profusely and unconscious. He had cuts and was not able to talk. PW2 returned to his house to prepare to take the appellant to hospital.

12. After taking the appellant to hospital, he learnt that his other brother, the deceased, also had injuries. He returned, found him in a trench next to the road about 30 meters from where he had found the appellant and took him to hospital as well. The deceased had a broken hand and was bleeding from the head and hand. He was also unconscious and could not talk. He took him to the same hospital where he had taken the appellant. The deceased died later that night while undergoing treatment. He did not know who had assaulted the appellant and the deceased.

13. Dr. Daniel Katua, (PW1), conducted a post mortem on the deceased on 22nd September 2008 at Hema Hospital at the request of the police. He observed that the deceased's body had bloodstains on the head and face; he had a large cut with depressed skull fracture on the left parietal area; he had a few hematomas and a fracture of the left upper arm. In his opinion, the deceased died of severe head injury. Under cross-examination, PW1 opined that the injuries to the deceased were caused by sharp and blunt object.

14. The trial court declined to grant the prosecution an adjournment in order to call the investigating officer as a witness on the ground that the trial had been adjourned on several occasions at the request of the prosecution. The prosecution was therefore constrained to close this case.

15. In his defence, the appellant in an unsworn statement stated that he was at home asleep on 13th September 2008 at about 10.00 pm when his wife woke him up and informed him that there was sound of break-in from the cattle boma next to the deceased's home; that he woke up and went out to check; that as soon as he got out he was hit on the head several times; that his wife screamed for help; that he lost consciousness and was taken to hospital where he was admitted before being discharged later; that while at the hospital he learnt that the deceased was sick; that the deceased was then taken to hospital where he died the same night.

16. The appellant stated that the police arrested him on the following day and subsequently charged him with the murder of the deceased. He stated that he had no grudge against the deceased and that they lived happily and that he did not participate in his death. He maintained that the testimony of PW3 was untrue; that he did not own the iron bar that allegedly inflicted the wounds on the deceased; that at the time the offence was allegedly committed he was asleep in his house and the assertion by PW3 that he heard the appellant's voice was untrue. According to the appellant, the month of September is usually dark and PW3 could therefore not have seen what was going on with the aid of moonlight.

17. After considering the evidence, the trial court entertained doubts as to whether PW3 did in fact visually identify the appellant. The trial court was however satisfied that PW3 properly identified the appellant through his voice, found him guilty and convicted him for the offence of murder. In that regard, the trial court said:

“In the instant case it is safe to say that PW3's voice identification of the accused was accurate since PW3 was not only familiar with the accused's voice, but it is a fact that they were related and were also neighbors. PW3 stated that he did not hear voices but a voice which he said was the accused's voice. I am therefore satisfied that PW3 properly identified the accused through the accused's voice.”

18. We have ourselves reviewed the evidence. The conviction of the appellant was based on the evidence of a single identifying witness. This Court has often stated that where the case against an accused person depends on the correctness of his identification, the trial court must exercise great care and caution before convicting an accused person in reliance of such evidence. See **Anjononi and**

Another vs. Republic [1980] KLR 59 and also **Edwin Chagali Musiega vs. Republic [2015] eKLR**

19. In **Cleophas Otieno Wamunga vs. Republic Criminal Appeal 20 of 1982 Kisumu** this Court had to decide whether evidence of identification formed a secure basis for a conviction. In doing so, the Court stated:

“... 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 a 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 in reliance on the correctness of identification...”

20. In **R vs. Eria Sebwato [1960] EA 174** the Court of Uganda held that:

“Where the evidence alleged to implicate an accused is entirely of identification, that evidence must be absolutely water tight to justify a conviction.”

21. Based on our review of the evidence, on record, unlike the trial court, we are ourselves satisfied that the circumstances of identification were, in the words of this Court in **Wamunga vs. Republic (1989) KLR 424**, *“...favourable and free from possibility of error...”*

22. As stated unlike the trial court, we find, the testimony of PW3 on visual identification, credible. In addition to voice recognition, PW3 also visually identified the appellant, as the person who hit the deceased when he (the deceased) emerged from his house. His testimony in that regard was not shaken when the trial court examined him or when he was cross-examined by the appellant’s advocate. He consistently asserted that there was moonlight that was bright enough for one to see as far as 50 meters away. When the appellant hit the deceased, the two were only 10 meters from the witness. He was categorical that he was able to see the appellant. He even saw the clothes the appellant wore: a white shirt and a black trouser. He identified the tarimbo (iron bar) that the appellant used to strike the deceased. The description by PW3 of the injuries sustained by the deceased corresponds, to a large extent, with findings by PW1 who conducted the postmortem on the body of the deceased.

23. When that evidence is considered together with PW3’s testimony that he also recognized the appellant’s voice as the person who hurled insults at the deceased from outside the deceased’s house, we are satisfied that the identification of the appellant based on the evidence of PW3, is safe. There is no doubt, as observed by the trial court, that the appellant is PW3’s uncle; that they lived in the same compound not far from each other; and that he was undoubtedly familiar with the appellant’s voice. In the words of this Court in **Choge vs. Republic [1985] KLR** the conditions obtaining at the time when the voice recognition was made were such that there was no mistake as to what was said and who said it.

24. Voice identification in favourable circumstances is as good as visual identification. As this Court stated in **Maghenda Vs. Republic [1986] KLR 255**, *“Identification by voice can be a sound and reliable method of identification.”* Like visual identification, *“it can be equally safe and free from error, more so if the identification takes place at night”* – **Njeri Vs. Republic [1981] KLR 156 at P. 159** – when there is no likelihood of any noise from any quarter. However, care should be taken to ensure that there is no possibility of error and that the voice that was heard was actually that of the accused. In **Mbelle Vs. R. [1984] KLR 626**, while sounding this caution, the Court of Appeal laid guidelines as regards the evidence of voice recognition as follows:

“In relation to 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 what was said and who said it.”

25. In this case, PW3 said the attack on their house was in the dead of the night at about 11.00 p.m. There is no evidence of any noise at the scene at that time. In the circumstances, in the words of this Court in **Choge Vs. Republic [1985] KLR**, the conditions obtaining at the time when the voice recognition was made were such that there was no mistake as to what was said and who said it.

26. Finally, there is the complaint by the appellant that the investigating officer was not called to testify as a witness. Whereas the evidence of the investigating officer would probably have buttressed the prosecution case, the critical evidence in relation to the identification of the appellant was that of PW3 which on its own sufficiently established the appellant's identity. In **HARWARD SHIKANGA & ANOTHER V REPUBLIC [2008] eKLR**, this Court held that failure to call the investigation officer cannot automatically lead to an acquittal if otherwise there is sufficient evidence to prove a charge.

27. For those reasons, we do not consider that there is merit in the appellant's appeal. It is dismissed in its entirety.

Orders accordingly.

Dated and delivered at Kisumu this 29th day of July, 2016

D. K. MARAGA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

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DEPUTY REGISTRAR