IN THE COURT OF APPEAL

AT NYERI

(SITTING AT MERU)

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

CRIMINAL APPEAL NO 81 OF 2013

BETWEEN

PHILIP KARIUKI AMBAO ……………………………………….. APPELLANT

AND

REPUBLIC …………………………………………………………RESPONDENT

(*Appeal from the judgment of the High Court of Kenya at Meru (Lesiit, J)*

dated 7th June, 2012

in

H.C.CR.C No 54 of 2008

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JUDGMENT OF THE COURT

The appellant **PHILIP KARIUKI AMBAO** was one of five persons arraigned before the High Court at Meru for the murder of one Jacob Kinyua (deceased). The Information is to the effect that on the 16th day of August, 2008, at Antubetwe Kingo Location in Meru North district of the former Eastern Province, jointly with others not before court they murdered the deceased. The appellant and his co-accused were tried by the trial court save that he alone was found guilty and sentenced to death as provided by law. His co-accused were set free for lack of sufficient evidence. It is the said decision which has given rise to the present appeal wherein the learned trial Judge is faulted both in law and fact for:-

- ***Wrongly convicting the appellant on the basis of a dying declaration contrary to law.***
- ***Flouting the provisions of Section 169 (1) and (2) of the Criminal Procedure Code-Cap 75.***
- ***Failing to substitute the charge of murder with the lesser one of manslaughter.***
- ***Convicting the appellant based on contradictory and insufficient evidence.***
- ***Failure to note that the ingredients of the offence of murder were not proved.***
- ***Discriminating between the appellant and his co-accused by convicting the former and acquitting the latter when the circumstances prevailing on the material date were the***

same.

- ***Finding that the appellant was properly identified when the circumstances surrounding the same were not free from error; neither was a proper inquiry made into the circumstances of identification.***
- ***Convicting the appellant against the weight of evidence.***
- ***Relying on extraneous matters and advancing her theory as she convicted the appellant.***

MISS JACQUELINE NELIMA, learned counsel appeared for the appellant while ***MR. KARIUKI MUGO***, learned Senior Prosecution Counsel appeared for the State. Counsel for the appellant elected to address us on ground 1 of the original memorandum of appeal; and grounds 1, 4 and 5 of the Supplementary Memorandum of Appeal. Those grounds encompassed matters to do with: - a dying declaration, alleged discrimination by the trial court as it convicted the appellant and acquitted his co-accused and identification. The rest were abandoned.

Counsel submitted that four out of five accused persons before the trial court were acquitted save for the appellant who was convicted on the basis of a dying declaration. She contended that although the learned trial Judge had cautioned herself, she placed reliance on the said declaration incorrectly. The testimony of PW 3 Habiba Nkatha (Habiba) touching on the names of his attackers given by the deceased came to the fore. Counsel submitted that the said witness gave a single name of the deceased's said attackers and that she did not give the name 'Muriuki the Sub-area" to the police. She further submitted that ***PW 2 PC PATRICK MUUA (PC MUUA)*** having found the deceased alive at the scene of the attack, the dying declaration was suspect. The case of ***JANE WANGUI MATHENGE VS REPUBLIC-CRIMINAL APPEAL NO 11 OF 1996*** was cited in support of the foregoing proposition. Next counsel argued the ground on identification and submitted that the attack on the deceased took place in the dead of night at about 2.00a.m. She queried how the deceased was able to identify his assailants at that hour contending that the evidence of identification was discriminatively applied to all the accused. Finally, counsel submitted that there was no evidence of a grudge between the appellant and the deceased.

For the State, Mr. Mugo submitted that the trial court had considered the identity of the appellant as described by the deceased; and that he was named as the "Sub-area", a local administrator. Moreover, counsel submitted that ***PW 4 GRACE MUKIRI (GRACE)***, the deceased's wife saw the appellant and his co-accused at the scene of the crime with the aid of a huge fire which illuminated the area as bright as daylight.

This being a first appeal our primary role is to re-evaluate, re-assess and re-analyze the evidence tendered before the learned trial Judge and then arrive at our own independent conclusion bearing in mind that we did not see the witnesses as they testified. In ***OKENO V REPUBLIC [1972] EA 32*** it was aptly put by the predecessor of this Court as follows:-

> ***"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 V 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. (SHANTILEL M. RUWAL V R [1957] EA 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 V SUNDAY POST [1958] EA 424".***

We have considered the grounds of appeal, submissions by counsel and the law. We have also examined, considered and re-evaluated the evidence freshly and exhaustively. It is our considered opinion that the central cog upon which this appeal turns is that of the dying declaration made by the deceased; with the smaller cogs being those of the identity of his assailants, and the doctrine of common intention. Thus, the establishment of a valid dying declaration would certainly determine whether the appellant was one of the deceased's assailants; and ultimately confirm or discount his culpability for the offence of murder. Dying declarations are underpinned by **Section 33 (a)** of the **Evidence Act-Cap 80** in the following terms:-

"Statements, written or oral, or electronically recorded of admissible facts made by a person who is dead ….are themselves admissible in the following cases-

- ***When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question and such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question;"***

This Court has considered the said provision in several cases including ***PIUS JASUNGA S/O AKUMU V R (1954) 21 EACA 333*** where the predecessor to this Court stated:-

"The question of the caution to be exercised in the reception of dying declarations and the necessity for their corroboration has been considered by this court in numerous cases and a passage from the 7th Edition of Field on Evidence has repeatedly been cited with approval…. It is not a rule of law that in order to support a conviction there must be corroboration of a dying declaration (R-V- ELIGU S/O ODEL&ANOTHER (1943) 10EACA 9) and circumstances which go to show that the deceased could not have been mistaken in his identification of the accused…. But it is generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person made in the absence of the accused and not subject to cross-examination unless there is satisfactory corroboration".

Our evaluation of the evidence on record reveals that the learned trial Judge appreciated the statutory provisions and treated the testimonies of Habiba, Grace and that of ***PW 6 ISAAC MEME (ISAAC)*** with the requisite caution. The testimonies in question form the crux of the deceased's dying declaration and have a striking similarity with regard to the names of the assailants mentioned by the deceased prior to his demise. However, the same has to be placed against the guidelines set out by the ***JASUNGA CASE*** set out hereinabove. Notable in this regard would be the question of corroboration which is required as a matter of cautionary practice though not a rule of law in the strict sense.

We note that the appellant's name was mentioned by Habiba, Grace and Isaac, persons who were not only kith and kin to the deceased but were also present during and after the attack. Their respective testimonies withstood the test of cross-examination. Of interest is the testimony of ***PW 5 KIARIE IKIUGE*** alias ***JOHN*** (***KIARIE)*** who was a friend to the deceased and was visiting at the time of the attack. He admits to being in the area for a short period to wit:-

"I had been at that place for only seven days, so I did not know people from that area".

However, for someone who had been in the area for such a short period of time, he had more than a passing recollection of the person of the appellant. We reproduce relevant excerpts of his testimony under Examination-in-chief as follows:-

"The sub-area started beating me while others started setting house ablaze".

"One is Muriuki and the other three (pointing at accused dock)".

"He was cutting me with the others as I lay on the ground".

"I cannot identify the other three I only knew Muriuki because he is the one who used to come to Kinyua's place".

"Muriuki had come with a person he had arrested".

"Kinyua told him to release the person as it was night and we would bring him next day".

"Kinyua said they may be attacked by a lion as it was night".

"That is the day I met Muriuki for the first time".

We also reproduce excerpts of part of his testimony under cross-examination;

"Yes I was a stranger at that place that day".

"Yes I was sleeping in a store".

"Those who cut me were those people who were there and the sub-area".

"I cannot recognize the rest, only Muriuki".

"I knew Muriuki because it's the name Kinyua called him by".

The unease of the learned trial Judge was palpable as she applied her mind to the foregoing excerpts and the testimony of Kiarie as a whole. It is clear that the trial court was struggling with the question of whether the foregoing testimony qualified as that of identification or recognition. We find closure in the matter through the case of ***PETER MUSAU V REPUBLIC* (2008) eKLR** where this Court stated thus:-

> ***" We do agree that for evidence of recognition to be relied upon, the witness claiming to recognize a suspect must establish circumstances that would prove that the suspect is not a stranger to him, and thus to put a difference between recognition and identification of a stranger. He must show for example that the suspect had been known to him for sometime, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness in seeing the suspect at the time of the offence can recall very well having seen him before the incident in question".***

We are therefore persuaded that the evidence of Kiarie was that of recognition and that he positively identified the appellant.

Accordingly, we find and hold that the foregoing excerpts corroborate the dying declaration of the deceased and dispose of grounds 1 and 4 of the supplementary memorandum of appeal.

We now turn to the subject of identification whose import was appreciated by the trial court when it paid deference to this Court's holding in ***CLEOPHAS OTIENO WAMUNGA VS REPUBLIC* [1989] KLR 424**. In ***MAITANYI VS REPUBLIC* (1986) KLR 198**, this Court at page 201 held that:-

> ***"The strange fact is that many witnesses do not properly identify another person even in daylight… It is at least essential to ascertain the nature of the light available. What sort of light, its size and position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are unknown because they were not inquired into …"*** See ***WANJOHI& OTHERS VS REPUBLIC* (1989) KLR 415**.

Another pertinent holding of this Court from the said case was to the effect that:-

> "***There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his or her assailants to those who came to the complainant's aid, or to the police. In this case no inquiry of any sort was made… If a witness receives a very strong impression of the features of an assailant, the witness will usually be able to give some description".***

The above holdings of the ***MAITANYI CASE*** (supra) resonate with the present appeal, as the events of the fateful night occurred at 2.00 a.m. under the glow of a huge fire. We are persuaded that the guidelines

set out in the English case of ***R V TURNBULL*** ***[1977] QB 224*** are of utility herein. Therein the court stated as follows:-

> ***"If the quality [of the identification evidence] is good and remains good at the close of the accused's case, the danger of mistaken identification is lessened; but the poorer the quality, the greater the danger. In our judgment when the quality is good, as for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbour, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it; provided always, however, that an adequate warning has been given about the special need for caution [….]***
>
> ***When, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example, when it depends on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification."***

Thus, the question becomes whether the quality of evidence on identification was good at the outset and remained so to the end of the prosecution case. If not, then which other evidence supports the correctness of identification.

We notice from the record that the trial court grappled with the subject of identification at length, no doubt knowing the implications of its finding to the appellant and his then co-accused's case. We also notice the absence of an identification parade following the arrest of the appellant and his co-accused. The trial court correctly deduced that Kiarie had a very close encounter with the deceased's assailants. It ought in our considered and respectful view, to have conclusively determined whether or not Kiarie had seen the appellant prior to the attack. Going by the excerpts of part of the evidence of Kiarie which we have reproduced hereinabove, it is clear that he had seen the appellant previously. Accordingly, we find and hold that this was a case of identification by recognition and that the appellant was properly identified by Kiarie. We shall interfere only to that extent with the finding of the trial court in line with the holding of this Court in ***JABANE V OLENJA*** ***[1986] KLR 661*** to the effect that:-

> ***"… this court has held that it will not lightly differ from the findings of fact of a trial judge who had the benefit of seeing and hearing all witnesses, and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on the wrong principles in reaching the findings he did".***

Having answered the queries on the dying declaration and identification in the affirmative, it is our considered opinion that the appellant caused the death of the deceased with malice aforethought as defined at **Section 206** of the **Penal Code-Cap 63.** We can do no more than reiterate the provisions of **Section 9 (3)** of the **Penal Code-Cap 63** in response to the submission by the appellant's counsel that there was no grudge between the appellant and the deceased:-

> ***" 9 (3) Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility".***

We are satisfied that the learned trial Judge properly invoked and applied the doctrine of common intention. The upshot of the foregoing is that we find no merit in this appeal and dismiss it in entirety and affirm the conviction and sentence meted out by the High Court.

Dated and delivered at Meru this 19th day of October, 2016

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