



**IN THE COURT OF APPEAL**

**AT KISUMU**

**CORAM: MARAGA, AZANGALALA & KANTAI JJ.A)**

**CRIMINAL APPEAL NO. 261 OF 2011**

**BETWEEN**

**FELIX SHIKUTWA ANDALO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An Appeal from the Judgment of the High Court of Kenya at Kakamega*

*(Lenaola, J.) dated 14<sup>th</sup> March, 2011*

**in**

**H.C.CR.C. NO. 45 OF 2006)**

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**JUDGMENT OF THE COURT**

The appellant, **Felix Shikutwa Andalo**, was convicted of murder contrary to **Section 203** as read with **Section 204** of the Penal Code and sentenced to life imprisonment. He now comes to this Court appealing against that conviction (by *Lenaola, J.*). There were originally three accused persons but two: **Felix Shikokoti Misikhu** (2<sup>nd</sup> accused) and **Patrick Mutelwa Ismondi** (3<sup>rd</sup> accused) were acquitted by the High Court. There were originally two grounds of appeal but when the appeal came up for hearing before us on 11<sup>th</sup> November, 2014 Mr. Owino, learned counsel for the appellant, decided to argue them as one that the learned Judge erred in both law and fact by convicting the appellant when the evidence on record clearly showed that the prosecution had failed to prove its case beyond reasonable doubt.

The facts upon which the appellant was convicted were straightforward. They were given by **Geoffrey Shalo (PW1) (Shalo)**, the deceased's grandchild and **Celestine Munanga (PW2) (Munanga)**, the deceased's niece. Both were staying with the deceased at the material time. Shalo testified that on the material day, 9<sup>th</sup> July, 2006, at about 8.00 p.m. he had prepared dinner in the kitchen, separately situated from the main house where the deceased was, and Munanga had taken food to the deceased in the main house. As she returned to the kitchen she met people and screamed. Shalo said he saw one of those people who he first said he had not known before. The person slapped and hit him on the head and he hit

the wall. The lamp went off. He then heard the deceased screaming which screams died down immediately as another attacker emerged from the main house. The second attacker cut him on the mouth. He said he did not identify the second attacker.

Shalo then went to the main house and found the deceased on the ground, bleeding from the neck. He was joined by Munanga who returned to the house with neighbours. The deceased was taken to Mukumu Hospital and investigations commenced.

Munanga confirmed in her testimony that as she took food to the main house from the kitchen, she saw a tall man who tried to hold her. She screamed which screams attracted the deceased as she (*Munanga*) ran to a neighbour's house. Munanga claimed she identified the appellant as the attacker who according to her, was armed with an iron bar. She informed her neighbour and his wife who accompanied her to the house where she found the deceased groaning in a pool of blood. The neighbours reported the attack to the Administration Police officers at Shikoti Camp. The deceased was then taken to Mukumu Hospital.

The deceased died while undergoing treatment. *Dr. Anjira (PW11)*, opined that the cause of death was acute severe haemorrhagic shock secondary to severe bleeding.

Mr. Owino submitted that malice aforethought was not proved and that the evidence of Shalo and Munanga, on identification, was not positive as none of them saw the person who killed the deceased. Learned counsel specifically singled out the evidence of Shalo which was contradictory on the crucial issue as to whether he knew the appellant before the attack. Learned counsel discredited the evidence of Munanga regarding her description of the attacker which description did not match that of the appellant's appearance.

It was also learned counsel's submission that the evidence on identification should not be believed because having acknowledged that Shalo and Munanga were related to the appellant, they did not explain why they did not mention the appellant's name in their first report. This fact, according to counsel, was compounded by the fact that identification parade evidence was not produced at the trial.

Learned Senior Prosecution Counsel, Mr. Sirtuy, supported the conviction of the appellant as, in his view, the appellant was positively identified by Shalo and Munanga.

We have considered the facts of this appeal, the grounds of appeal and the submissions of learned counsel. It is plain to us that the main issue here is whether the appellant was properly identified. The evidence of Shalo and Munanga, the identifying witnesses, is therefore pertinent to our consideration of the issue. With regard to the testimony of Shalo, the record shows that in his evidence in chief he claimed that he did not know the attacker prior to the attack on the material night. Yet in cross-examination, with regard to the same attacker, he stated:

***"I know the 1<sup>st</sup> accused Felix. Also the 2<sup>nd</sup> accused is also a relative. The 3<sup>rd</sup> accused is also a relative. The 1<sup>st</sup> accused is also a relative."***

So, what version of the evidence of Shalo was credible? The learned Judge of the High Court does not, with all due respect to him, appear to have considered the apparent contradiction in Shalo's testimony. If Shalo was related to the appellant and knew him prior to the attack, the question arises as to why Shalo did not mention his name in his first report. We say Shalo did not mention the appellant's name in his first report on our consideration of the record of the High Court. Whilst Shalo was being cross-examined, the learned Judge recorded as follows:

**"Witness confirms that he did not give the accused's names to the police."**

And whilst Shalo was being re-examined, the learned Judge recorded:-

**"Court – Whether witness told police that he identified the attackers."**

**Mr. Karuri – the statement reads as follows – I was attacked by one I did not know.”**

So, was the identification of the appellant by Shalo mere dock identification? In that event an identification parade should have been conducted to confirm that identification. The record does not show that identification parade evidence was ever adduced. We are also of the view that Shalo did not have adequate time to observe the physical features of the attacker to enable him remember him. According to his evidence, immediately he sighted the attacker, he was slapped and he hit on the wall. The lamp was then immediately put off. He was then hit on the head with an iron bar. In those circumstances, we think identification was not free from the possibility of error particularly as the attacker had taken steps to disguise himself.

In our view, the identification of the appellant by Shalo was discredited to the core.

We now turn to the testimony of Munanga. In her own words:-

***“We were taking food to the main house. There was light from the main house and there was moonlight. I saw a tall man who tried to hold me. I screamed. The man held Geoffrey. My auntie heard the screams and she came. I ran to a neighbour called Wycliffe. I saw one person. It was the accused.”***

From the above extract, it is plain that Munanga left the scene before any one was assaulted. She indeed left the deceased before the deceased was attacked. Her description of her attacker was as follows:

***“... a tall man who tried to hold me.”***

And in cross-examination, she added:

***“... he had a muffin/cap on the head and a long black coat. The cap had not covered the head fully....***

***I was called to a parade and I identified the 1<sup>st</sup> accused.”***

Given the above testimony, it is our view that the identification of the appellant by Munanga was not free from the possibility of error. She only had a fleeting moment to observe the physical features of the attacker whose clothing was meant to make identification difficult. The attacker was a stranger to her and a properly mounted identification parade would probably have confirmed that identification. According to Munanga, an identification parade was indeed mounted and she picked out the appellant. But identification parade evidence was not produced at the trial. Munanga’s evidence therefore remained dock identification which is generally considered worthless in the absence of a well conducted identification parade. (See **Achode - V – Republic [2004] 2 KLR 81**).

With the evidence of Shalo and Munanga, on identification, gravely discredited, no credible evidence against the appellant remained. We are disturbed that the learned Judge of the High Court does not appear to have sufficiently appreciated the poor quality of the evidence of Shalo and Munanga, especially with regard to the crucial issue of identification. If the learned Judge had evaluated the evidence of identification as we have done, we doubt if he would have convicted the appellant as he did.

In view of what we have said, we allow this appeal, quash the conviction of the appellant and set aside the sentence of imprisonment for life imposed on him. He shall be set free forthwith unless he is otherwise lawfully held. We so order.

**DATED AND DELIVERED AT KISUMU THIS 5TH DAY OF FEBRUARY, 2015.**

**D.K. MARAGA**

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**JUDGE OF APPEAL**

**F. AZANGALALA**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**