



IN THE COURT OF APPEAL

AT MALINDI

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

CRIMINAL APPEAL NO. 122 OF 2014

BETWEEN

SAFARI KOMBE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the conviction and sentence of the High Court of Kenya at Malindi, (Meoli, J.) dated 21<sup>st</sup> October 2014

in

H.C.CR. C. NO. 5 OF 2012)

\*\*\*\*\*

JUDGMENT OF THE COURT

On 21<sup>st</sup> October 2014, the High Court at Malindi, (*Meoli, J.*) convicted the appellant, *Safari Kombe*, of the offence of murder contrary to *section 203* as read with *section 204* of the *Penal Code* and sentenced him to death. The conviction and sentence followed his trial on an information charging him with the murder of *Joseph Kiponda (the deceased)* at *Majenjeni Village, Kilifi County* on 8<sup>th</sup> March 2012. Aggrieved by the decision the appellant preferred the current appeal in which he challenges his conviction on the grounds that his identification was not safe; that the prosecution case was built on fabricated and contradictory evidence; and that the prosecution failed to prove malice aforethought on his part.

The prosecution case against the appellant was built around the evidence of seven witnesses, two of whom, (*SN (PW1)* and *Karume Shida (PW2)*), testified to having witnessed the appellant assaulting the deceased with a *rungu*. Two other witnesses, *Robert Paul Kambi (PW4)* and *Katana Chome Ngala (PW5)* testified that they chased and arrested the appellant immediately after he had assaulted the deceased. Their evidence was that they had chased him from the *locus in quo* and arrested him without ever having lost sight of him.

The substance of the prosecution case was that on the night of 8<sup>th</sup> March 2012 at about 9.00 pm *PW1*, a 13-year-old girl was outside their house playing with her cousins, *Z* and *M*. The deceased, who was their

grandfather walked out of the house to relieve himself in the nearby bushes. As he walked back into the house, the appellant appeared suddenly and hit him on the head with a *rungu*. The deceased screamed and fell down. When PW1 and her cousins approached, the appellant threatened them before running away. PW1 was about 5-6 meters away when she witnessed the appellant assault the deceased. Regarding the nature of the lighting that night, the prosecution case was that although the offence was committed at night, there was sufficient moonlight for PW1 and the other witnesses to identify the appellant, who was known to them.

The evidence of **PW2**, a son of the deceased, was that while in his house after dinner, he heard PW1 and her cousins screaming that their grandfather was being killed. He walked out and from a distance of about 10 meters saw the appellant assaulting the deceased. He raised an alarm and the appellant fled from the scene.

**PW4** testified that he was similarly in his house on the material night when he heard PW2 raise an alarm. He went outside and met the appellant who was fleeing. Together with **PW5**, they gave chase, apprehended him and brought him back to the deceased's home where the deceased confirmed that it was the appellant who had assaulted him. PW5's evidence confirmed his involvement in the pursuit and arrest of the appellant.

**PW7, Dr. Francis Otieno** produced in evidence the deceased's postmortem report prepared by **Dr. Wahome**. According to that report the deceased sustained a fracture from the left parietal across the frontal, down right parietal adjacent to sagittal suture about 38 cm and extensive subdural hematoma. According to the doctor, the cause of death was a head injury arising from an assault.

Put on his defence, the appellant made an unsworn statement in which he stated that on the material night and at the material time, he was on his way home when he heard noises emanating from the deceased's home. He decided to inquire what was happening, but instead the people he found there seized him, beat him up and accused him of murdering the deceased. He was taken to Malindi Police Station and was subsequently charged with the murder of the deceased. As far as he was concerned, the case against him was fabricated because he had disagreed and fought with one **George Kitsao**, a brother of the deceased.

Urging the appellant's appeal, **Mr. Ngumbao Mutua**, learned counsel, submitted that the identification of the appellant was unsafe. While the prosecution admitted that the offence was committed at night, counsel submitted, the intensity of the moonlight, which was used to identify the appellant, was never considered or inquired into by the trial court. In counsel's view, the fact that PW1 had at first thought the appellant was somebody else and that PW5 could not initially identify the person who was running away, was clear indication that the identification of the appellant was not watertight and safe.

As regards the arrest of the appellant, counsel submitted that there was no continuous or sound link between the commission of the offence and the arrest of the appellant because the witnesses who testified to having witnessed the appellant assaulting the deceased were not the ones who arrested the appellant and that the witnesses who arrested the appellant were not at the *locus in quo* and had therefore not witnessed the assault on the deceased.

In support of the contention that the case against the appellant was fabricated, counsel submitted that all the prosecution witnesses save for **PW6, PC John Muithya**, the investigating officer, were relatives who had a grudge against the appellant. Developing the argument further, counsel submitted that when the appellant was arrested, he was not found in possession of the deceased's property that he was alleged to have stolen after the assault. In addition, it was contended, there was serious contradiction between the prosecution witnesses regarding by whom, when and where the *rungu* that was used to assault the deceased was found. In counsel's view, the contradictions on that issue were hallmarks of a fabricated case.

Lastly Mr. Mutua submitted that the prosecution had failed to prove any malice aforethought on the part of the appellant. In his view there was no evidence that the appellant had intended to cause the death of the deceased. In light of what the appellant contended to be fabricated and contradictory evidence, we

were urged to find that the prosecution had not proved its case beyond reasonable doubt.

Opposing the appeal, **Mr. Monda**, learned **Assistant Director of Public Prosecutions** submitted that the appellant was properly identified as the deceased's assailant and that all the relevant witnesses had consistently testified that there was bright moonlight on the night of the attack. In counsel's view, the witnesses were in close proximity with the appellant and were able to see him properly. In addition, it was submitted, this was not a case of identification, but one of recognition because the appellant was well known to PW1 and PW2, who saw him assaulting the deceased, and PW4 and PW5, who arrested him shortly thereafter. In any event, counsel urged, the appellant had in his defence placed himself squarely at the scene.

Regarding the arrest of the appellant, we were urged to find, as the trial court did, that the chain of events from the commission of the offence to the arrest of the appellant was continuous and unbroken. It was contended that immediately after PW1 and PW2 saw the appellant assaulting the deceased, alarm was raised and the appellant fled. He was seen fleeing by PW4 and PW5 who gave chase and arrested him in a thicket.

Discounting that the case against the appellant was fabricated and contradictory, Mr. Monda submitted that no basis had been established for such conclusion. If there was any disagreement, it was contended, the same was only between the appellant and a brother of the deceased who was not a witness in the case. It was also submitted that the appellant had not suggested that PW 1, PW4 and PW5 had any grudge against him.

On the contradictions in the prosecution case pertaining to the recovery of the murder weapon, learned counsel submitted that the same were not significant because several witnesses had properly identified the murder weapon in court. We were accordingly urged to find, like the trial court did, that any contradictions regarding recovery of the murder weapon were not material.

Mr. Monda concluded by submitting that from the circumstances of this appeal, malice aforethought as defined in section **206 of the Penal Code**, was properly inferred on the part of the appellant by the High Court because of the nature and severity of the injuries inflicted upon the deceased. Noting that the deceased had sustained a fractured skull, it was submitted that the trial court had properly inferred that the appellant intended to cause the death of the deceased and that we should not interfere with that finding.

We have duly considered the record of appeal, the judgment of the High Court, the appellant's grounds of appeal and submissions by counsel. As required of us in a first appeal, we have reevaluated and reappraised the evidence with a view to making our own independent conclusions, though bearing in mind that we did not enjoy the advantage that the trial judge had of hearing and seeing the witnesses testifying (See ***OKENO V. REPUBLIC (1972) EA 32*** and ***NJOROGE V. REPUBLIC (1982-88) 1 KAR 1134***).

The courts of this land have consistently insisted that where the evidence against an accused person is evidence of identification, that evidence must be closely examined to ensure that it is safe to found a conviction. This cautious approach is informed by the fact that frequently people are mistaken when identifying person, even under favourable conditions. Thus in ***WAMUNGA V. REPUBLIC (1989) KLR 424, 426***, the Court stated:

***"...it is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction."***

It is common ground that the offence was committed at night, at about 9.p.m. In her evidence-in-chief, PW1 described the night as follows:

***"It was a night of bright moonlight so I saw everything clearly."***

On cross-examination, she stated:

***“There was moonlight, not darkness. There was a lot of moonlight.”***

PW2 too described the moonlight as **“bright”**. On being cross-examined about the intensity of the moonlight, he responded as follows.

***“It was a bright night with moonlight.”***

Both PW4 and PW5 also testified that there was moonlight, with PW5 describing it as **“bright”** in his evidence-in-chief.

What we find more compelling in this appeal is that the appellant was well known to PW1, PW2, PW4 and PW5. According to PW1, the appellant lived in their area, although they were not immediate neighbours. She knew him as a member of a local football club, which practiced in her school compound. When the attack took place, PW1 was about 5-6 meters away. She even spoke to the appellant when he threatened her and her cousins, before fleeing.

On his part PW2 described the appellant as a fellow villager, whose house was about 1 km away. In addition, it was the evidence of this witness that he had been a schoolmate of the appellant. PW4 and PW5 also testified that they were able to recognize the appellant after they chased and apprehended him. In the words of PW4, the appellant’s home was “close by”, while PW5 testified that he had known the appellant for a long time.

This Court has often made a distinction between identification and recognition, and has held that evidence of recognition is more assuring than evidence of identification. Thus in ***ANJONONI & OTHERS V. REPUBLIC (1976-80) 1 KLR, 1566***, the Court, while accepting evidence of recognition, stated as follows at page 1568:

***“This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.”***

We are accordingly satisfied that the PW1, PW2, PW4 and PW5 recognised the appellant and were able to identify him as the deceased’s assailant.

The circumstances surrounding the arrest of the appellant also give assurance that his identification was safe. The evidence of PW2 was that, like PW1, he had witnessed the appellant land blows on the deceased. He raised an alarm and the appellant fled. PW4 and PW5 who responded to the alarm saw the appellant running away from the scene. They pursued him immediately and apprehended him in a thicket. From the evidence on record, we do not find any merit in the appellant’s contention that there was no link or continuous chain of events from the commission of the offence to the arrest of the appellant. That chain of events was not broken and we are satisfied that the assailant, who was seen by PW2 attacking the deceased, was the same person that PW4 and PW5 apprehended immediately thereafter (See ***ALI RAMADHAN V. REPUBLIC, CR. APP. NO 79 OF 1985***).

As regards the contention that the case against the appellant was fabricated, we do not see anything on record to support that point of view. In our view the trial court properly addressed its mind to that issue when it stated:

***“If it is true that PW3 and Kirao (sic) (George Kitsao) had bad relations with the accused, no enmity was alleged to exist between PW4 and PW5 on the one hand and the accused on the other. Further, PW1 the child who gave forthright and in my view convincing evidence, could not have been party to any of the adults’ disagreements. Neither did she appear to me to be a coached witness, rather one who seemed credible and truthful, going by the details contained in her evidence, and the accompanying demeanor.”***

On an issue like this which turns on the demeanour and credibility of witnesses, and in the absence of anything on record that would justify our intervention, as an appellate court we must defer to the conclusions of the trial court which had the advantage of seeing and hearing the witnesses. In **JOSEPH KARIUKI NDUNGU V. REPUBLIC CR. APP. NOS. 183 & 186 OF 2006** the Court emphasized the point thus:

***“We, however, appreciate that the trial judge had the advantage of seeking 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.”***

As regards the contradictory evidence on who recovered the murder weapon, when and where, we do not think much turns on that. The witnesses identified in court the *rungu* that the appellant had used to assault the deceased. The trial court noted that it was a long wooden stick of about 3 cm in diameter. The discrepancies regarding who recovered it, when and where were not material in the circumstances of this case. It is the type of discrepancy that did not occasion any failure of justice and therefore cannot, on its own, form the basis for quashing a conviction under section 382 of the Criminal Procedure Code (See **WILLIS OCHIENG ODERO V. REPUBLIC, CR. APP. NO. 80 OF 2004**).

The last ground on which this appeal was fought was whether the prosecution proved that the appellant caused the death of the deceased with malice aforethought. It is trite that whether or not malice aforethought is proved in any prosecution for murder depends on the peculiar facts of each case. (See **MORRIS ALUOCH V. REPUBLIC CR. APP. No 47 of 1996**).

**Section 206** of the Penal Code provides as follows regarding malice aforethought:

***“206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances –***

***(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;***

***(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;***

***(c) an intent to commit a felony;***

***(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony”.***

In this appeal, the appellant used a heavy *rungu* to hit the deceased on the head, a rather sensitive part of the body. The force used in the assault is reflected in the extent of the injuries from which the deceased succumbed, namely an extensive fracture of the skull, as detailed in the post mortem report. In our view the High Court rightly inferred on the part of the appellant, under section 206 (b) of the Penal Code, knowledge that the kind of assault that he subjected the deceased to would probably cause his death or grievous harm, although he was indifferent whether death or grievous bodily harm would result. Indeed, in determining the presence or absence of malice aforethought the court takes into account among other things, factors such as the part of the body injured, the type of weapon used, if any, and the type of injuries inflicted upon the deceased. (See **REX V. TUBERE S/O OCHEN (1945) 12 EACA 63**, and **CHESAKIT V. UGANDA, CR. APP. NO. 95 OF 2004**).

Having carefully reappraised the evidence on record, we are not satisfied that there is any basis upon

which we can interfere with the findings and conclusions of the trial judge. Accordingly we find no merit in this appeal and dismiss the same.

**Dated and delivered at Malindi this 30<sup>th</sup> day of October, 2015.**

**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**