REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NYERI

(SITTING AT MERU)

(CORAM: VISRAM, KOOME & ODEK, JJ.A.)

CRIMINAL APPEAL NO 240 OF 2011

BETWEEN

HARO GUFFIL JILLO ……..……APPELLANT

VERSUS

REPUBLIC…….RESPONDENT

(An appeal from the conviction and sentence of the High Court of Kenya at Meru

(Lesiit, J.) dated 7th July, 2011

in

H.C. CR. C. No. 33 of 2005)

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JUDGMENT OF THE COURT

[1] On the 18th day of April 2005, at about 10.00 a.m., at Ngurtum area of Marsabit along Songa Road, a group of youth were returning from a church fellowship. While walking in a group, they were attacked by people believed to be bandits. The attackers were three in number and they fired gunshots at the children indiscriminately killing three of them instantly. Haro Gruffu Jilo, the appellant was arraigned before the High Court in Meru with the offence of murder contrary to ***Section 203*** as read with ***Section 204*** of the ***Penal Code***. The Information of the charge was that on the 18th day of April, 2005, at Ngurtum area along Marsabit /Songa road of Marsabit District within Eastern Province, with others not before court the appellant murdered Lillian Garawale. In the course of the trial the prosecution unsuccessfully attempted to amend the charge sheet to include the charge against the other two deceased persons who were killed during the same incident.

[2] The appellant pleaded not guilty, in a trial that was aided by two assessors, twelve prosecution witnesses gave evidence in support of the charge. The appellant gave sworn evidence in his defence and called no witnesses. The learned trial Judge summed up the evidence and directed the assessors on the

points of law arising in the trial. The assessors returned a unanimous verdict that the accused was guilty as charged. Upon evaluating the evidence by both the prosecution and defence, the trial Judge was satisfied that the prosecution proved its case to the required standard; the defence by the appellant was found without legal basis. The appellant was convicted of the offence of murder and sentenced to death.

[3] Aggrieved by the conviction and sentence, the appellant has appealed in this Court. By the homemade memorandum of appeal, the appellant principally challenged the judgment by the High Court on the evidence of identification which he argued was not reliable; the evidence of identification parade that he contended was not conducted according to the required standards; reliance on contradictory evidence by the prosecution witnesses and failure by the trial court to consider his defence. These grounds were augmented by the supplementary grounds that were filed Miss Kiome, learned counsel for the appellant which raised four other grounds as follows;

1. *"**The learned trial court erred in law and in fact in not finding that the evidence of identification by minor children was not free of error and that it was not safe to found a conviction without any other independent evidence to corroborate it.***

2. ***The learned trial Judge erred in law and in fact in not finding that the witnesses who allegedly identified the appellant in the parade did not give the person they were going to identify descriptions and features prior to parade nor did the parade forms note the reasons for identification, thus diminishing the value of identification evidence.***

3. ***The court failed to carefully consider the defence as per the law required and thus the appellant suffered prejudice.***

4. ***The court erred in law in allowing prejudicial evidence of previous conviction to be tendered which poisoned courts mind thus prejudiced the appellants defence."***

[4] The above grounds were further elaborated by Miss Kiome who cited some authorities to support the arguments that the identification of the appellant by children should not have been relied on without independent corroboration. The oft' cited cases of ***ABDALLA BIN WENDOH & ANOTHER V REGINA, (1953) EACA 166*** the predecessor of this Court held;-

"…Although subject to certain exceptions a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of such witness respecting the identification especially when it is known that the conditions favouring a correct identification are difficult. In such circumstances other evidence circumstantial or directly pointing to guilt is needed".

See also the case of ***MAITANYI V REPUBLIC) , (1986 KLR 196.*** In this case this Court went further and set out what constitutes favorable conditions for a correct identification by a sole testifying witness. In this case counsel for the appellant argued that the evidence by the three witnesses could not be relied upon due to their age. It was only SKE (PW2) aged 17 years whose evidence could be relied upon. However, due to the prevailing circumstances when the attack happened, this evidence also required corroboration. The witnesses scampered for safety after the gunshots were fired. Therefore, the trial Judge ought to have taken into account the prevailing circumstances and the distance involved. See the case of of ***R vs. Turnbul and Others, (1976) 3 ALL ER 549.*** This Court relied on it in its judgment in the case of ***Wamunga vs. Republic, (1989) KLR 424*** in which it held *inter alia* as follows:-

"1. 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 a conviction.

2. Recognition may be more reliable than identification of a stranger but mistakes in recognition of close relatives and friends are sometimes made."

[4] It was further submitted that there were material inconsistencies in the evidence of the three eye witnesses, some described in their testimony that the attacker was wearing police uniform, while others said he was wearing a jungle jacket and black shorts. This was the only description given by the children. This description could not have led to the arrest of the appellant. Miss Kiome faulted the learned Judge for relying on a previous conviction of the appellant in ***Marsabit Criminal Case No 37 of 2005,*** which was prejudicial to the appellant and was inadmissible under the provisions of ***Section 57*** and ***58*** of the ***Evidence Act***. Counsel also took issue with the identification parade that she contended was conducted contrary to the set procedure. The appellant was not accorded a *Borana* interpreter during the parade where the proceedings were conducted in Kiswahili. Lastly the alibi defence by the appellant was not considered, it was upon the prosecution to disprove that he was not at a place called Jardessa when the offence occurred.

[5] On the part of the Prosecution, Mr. Okong'o learned prosecuting counsel opposed this appeal. He supported the judgment by the trial Judge which he submitted was supported by cogent evidence of identification of the appellant by 3 eye witnesses. There were 5 identification parades that were conducted and the appellant was picked by the witnesses. The attack occurred during the day, therefore the prevailing circumstances cannot be said to have been difficult. The appellant was arrested while herding cows; he was armed with an AK 47 Riffle that fitted the description given by the witnesses. He was suspected by the villagers to be hiding in a Manyatta where he was arrested. Counsel submitted that although under ***Section 124*** of the ***Evidence Act***, requires corroboration of evidence taken notwithstanding the provisions of ***Section 19*** of the ***Oaths and Declarations Act***, there is no provision that such evidence be corroborated by an adult witness. According to Mr. Okong'o, the evidence by the children was well received after a *voire dire* examination. He urged us to dismiss this appeal as the conviction was safe from any error.

[6] As this is a first appeal, the law requires us to revisit the evidence afresh and to analyze it, evaluate it, and come to our own conclusion but always keeping in mind that the trial judge had the benefit of observing and hearing the witnesses and giving allowance for that (See ***Okeno vs Republic, (1972) E A 32)***. Having done that and having considered the above submissions together with the record, we find the facts of the case as follows.

[7] The trial of the appellant before the High Court proceeded before four different Judges. It started before Lenaola J. who heard the evidence of 11 prosecution witnesses. Emukule J. took over the trial of the case and heard the evidence of the doctor who performed the postmortem examination on the body of the deceased and also the defence. The matter was taken over by Kasango J., she set aside the evidence of the doctor and the defence evidence on the grounds that they testified in the absence of the assessors who were in the trial. Lesiit J. invoked the provisions ***Section 201 (1)*** of the ***Criminal Procedure Code***; the appellant opted to proceed with the case from where it was left by the proceding Judges; and the matter continued from where Lenaola J., had left it.

[8] SK (PW2), JT (PW3), and KAL (PW4) were aged 17, 12, and 11 years respectively. On the 18th April, 2005, at about 10.00am, they were in a group of about 30 people returning from a church fellowship at the AIC Church at Songa; they were walking in groups of three . PW2 testified that she was in the first group alongside the late Peter Mosor, Lilian Learopo and Lillian Garawalla who were shot dead at the material time. She heard gunshots that felled Peter, she saw Allan trying to hold him. She saw Rapheal jump over the deceased. She ran away for a distance and returned shortly afterwards when she encountered a man speaking Kiborona language. She described him as a short black man armed with a gun, wearing a jungle jacket in the company of two others. She identified him as the appellant during a subsequent identification parade that was conducted by Inspector John Mutonga (PW9) on 4th May, 2005. PW3 and PW4 also identified the appellant during the parade. There were two other witnesses who participated during the parade but they were not called to testify.

[9] PW3 was aged 11 years when the incident occurred, he told the court that he and the late Peter were walking ahead of his group, he saw a man armed with a gun and in a police jacket chasing them. He suddenly heard gunshots and saw Peter falling down, he ran to a nearby bush. He looked through the bushes and saw the gunman shoot at two women. The gunman walked to where Peter was and cut off his

right ear and then shot him on the chest, after that he collected the spent cartridges from the ground. The gunman also fired at PW3 but somehow the bullets missed him. PW4 was in the same group, after the gunshots he told the court that he ran into the bushes and climbed a tree. From that vantage point he saw a man wearing a jungle jacket and shorts walking to where Peter was lying down, the gunman cut Peter's ear.

[10] The report of murder of the three victims was received at Marsabit Police station on the same day. Inspector Samuel Mbaabu visited the scene at Songa which was near the forest and found the three bodies of the victims, two girls and one boy. They also collected 4 cartridges at the spot where the bodies of the girls lay and 6 cartridges of 7.62mm special caliber were picked near the scene where the body of the boy lay. The cartridges were produced as exhibits. The bodies were identified for postmortem examination by Stephen Learapo (PW5) and Abdikadhir Mosor (PW7). The postmortem examination was carried out by Dr. Sambu. According to the report, the death of the three victims were caused by penetrating injuries caused by a gunshot.

[11] The appellant was re-arrested by PC Titus Yandai of Marsabit Police station after he was apprehended at Jaldessa area by 3 police reservist. The Kenya Police Reservist had arrested the appellant in connection with another offence where he was found with game trophies and an AK 47 Riffle. The appellant was handed to PW11, who conducted an identification parade after which the appellant was identified by PW2, PW3 and PW4. The appellant was placed on his defence, he gave a sworn statement denying the offence. He also testified that at the alleged time of the offence he was not at the scene but he was at Jaldesa.

[11] The entire evidence was considered by the trial Judge, satisfied that the prosecution had established its case against the appellant to the required standard, the appellant was convicted of the offence of murder. In finding the appellant guilty this is what the trial Judge stated in part of the judgment:

"The evidence adduced in this case establishes clearly that the accused was in the group of those who fired and shot the 3 deceased persons. Even if the accused himself fired no shot, having been in the company of others who shot the deceased, I am satisfied that the prosecution has proved that the accused was acting with one common purpose to cause grievous harm or death to the deceased on the material day. I find that the action of any member of his group was the action of each member of the group

…I have considered the accused person's defence. The accused stated that he was not present at the time and place where the murder was committed. He put forward an alibi as his defence. The Court of Appeal *in* ***UGANDA V. SEBYALA & OTHERS [1969] EA 204 adopted a decision made in the same year by Georges, CJ in TANZANIA CRIMINAL APPEAL, 12 D 68*** *thus;-*

"The accused does not have to establish that his alibi is reasonably true. All he has to do is create doubt as to the strength of the case for the prosecution. When the prosecution case is then an alibi which is not particularly strong may very well raise doubts"

I am guided by that persuasive authority. Having carefully considered the prosecution case, I find that there is overwhelming evidence that the accused was one of many people who attacked and wounded young person's among them the deceased, the other two who also died in this attack and many others who were in their company. I find that the prosecution case was so strong that the alibi defence did not shake or create any doubt in its regard".

[12] We have reevaluated the evidence, the judgment by the trial court against the grounds of appeal and the submissions made to us in this appeal. We agree with the trial Judge that there was nothing untoward regarding the proceedings at the identification parade. There is no indication that the appellant made a request for an interpreter, after all the parade did not involve a conversation, it was not about voice but physical identification. The parade form shows that the appellant indicated that he did not wish to have a friend or solicitor present during the parade. If he wanted a Boran interpreter that was the time he should have so requested. The attack also occurred in broad day light, each of the witnesses was able

to describe the position they were at when they saw the appellant during the attack.

[13] The other ground of appeal that was argued before us was regarding the need for corroboration of the evidence of the three eye witnesses who were children. PW2 was aged 17 years she gave sworn evidence; the age of seventeen cannot by any stretch of imagination be regarded as that of a child of tender years. The record shows that both PW3 and PW4 were subjected to *voire dire* examination, the Judge was satisfied that the two witnesses appeared confident and understood why they were before a court of law. They were both sworn and subjected to intense cross-examination. The true purpose of a *voire dire* examination is to establish whether a child of tender years understands two things: the nature of an oath and the need to tell the truth. In sum the court would be trying to establish whether the child possesses sufficient intelligence to understand the duty of speaking truthfully. See ***Republic -vs- Peter Kiriga Kiune -Criminal appeal 77 of 1982 (unreported), Johnson Muiruri -vs- Republic [1983] KLR 445***. If the court proceeds to take unsworn evidence, the accused should not be convicted in the absence of corroborating testimony. There is an exception for sexual offences. From the above verbatim record of the court, we are satisfied that the court complied fully with the procedure of taking evidence of a minor. See ***Macharia -vs- Republic [1976-80] 1 KLR 260, Johnson Muiruri -vs- Republic [1983] KLR 445***. Thus by dint of the provisions of ***Section 151*** of the ***Criminal Procedure Code***, their evidence was admissible. It is provided:

"Every witness in a criminal cause or matter shall be examined upon oath and the court before which any witness shall appear shall have full authority to administer the usual oath".

The three witnesses did not fall within the category of the provisions of ***Section 19 of the Evidence Act*** which provides for the admissibility of unsworn evidence by children of tender years as they gave sworn evidence. The trial Judge took into consideration the definition of a child of tender years as per the ***Children Act*** which defines a child of tender age as one below the age of 10 years.

[14] On the issue of the inconsistency noted in the evidence regarding the evidence of the three eye witnesses; we note that PW2 and PW4 said the attacker was wearing a jungle jacket while PW3 said he was wearing police uniform. The trial Judge found this a minor inconsistency and on our part we find the Judge was fully justified to come to that conclusion. The other issue was in regard to admission of evidence of the appellant's involvement in another Criminal Case No. 37 of 2005. We agree the evidence in that case was not necessary as the AK 47 Riffle that he was arrested with and the basis for the earlier conviction was not subjected to ballistic examination so as to be relied on in this case. However even disregarding this evidence, we find there was cogent evidence of identification of the appellant. The defence by the appellant was appropriately considered and found lacking in merit in the face of the evidence by the prosecution witnesses.

[15] All in all we concur with the finding of facts by the High Court, and as we have said on many occasions in the past, the Court of Appeal will not normally interfere with findings of facts by the trial court unless they are based on no evidence or misapprehension of the evidence, or the trial judge is shown demonstrably to have acted on wrong principles in reaching the decision (see ***Chemagong vs Republic, (1984) KLR 611*** and ***Kiarie vs Republic, (1984) KLR 739***. We have considered the submissions by Miss Kiome, learned counsel for the appellant, and have come to the conclusion that the appellant's conviction was safe, and that it was based upon very clear and overwhelming evidence.

[16.] In the upshot, this appeal lacks merit, it is hereby dismissed with the result that the conviction and sentenced imposed by the trial court stands.

Dated and delivered at Meru this 30th day of April, 2014.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

…….……..

JUDGE OF APPEAL

OTIENO – ODEK

…….

JUDGE OF APPEAL

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

DEPUTY REGISTRAR