



IN THE COURT OF APPEAL

AT NAKURU

(CORAM: NAMBUYE , G.B.M. KARIUKI & J. MOHAMMED - JJ.A)

CRIMINAL APPEAL NO. 130 OF 2013 (UR)

BETWEEN

JOSEPH MUNYOKI KIMATU.....APPLICANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Machakos

(Lenaola, J) Dated 17th February, 2009

In

H.C.C.C. NO. 25 OF 2004

JUDGMENT OF THE COURT

The appellant herein ***Joseph Musyoka Kimatu***, was arraigned before the High Court at Machakos with the offence of murder Contrary to Section 203 as read with Section 204 of the Penal Code, in that, on the night of 25th and 26th day of September, 2007 at Ngunguni village Kitise location in Makueni District of the Eastern Province murdered ***Kimatu Tuli***.

The appellant denied the charge. The prosecution called a total of seven (7) witnesses namely (***PW1***) ***Teresia Mukii Kimatu***, (***PW2***) ***No.316080 CPL John Mwanzia***; (***PW3***) ***Munyira Musyoka***; (***PW4***) ***Mutuku Kimatu***; (***PW6***) ***Dr. Francis Maingi Musyoki***; (***PW7***) ***No.203468 AP CPL Robert Mbiti***. The appellant was the sole witness for his defence. In a judgment delivered by ***Isaac Lenaola J*** on the 17th day of February, 2009 the learned Judge after assessing, analyzing and appraising the evidence before him found the appellant guilty as charged, convicted him and sentenced him to death.

The appellant was aggrieved by that decision and he appealed to this Court firstly, in a Home made Memorandum of appeal citing six (6) grounds of appeal. This was supplemented by a supplementary memorandum of appeal filed on 6th June, 2014 by the firm of ***Messers A. Oyalo & Co. Advocates*** on behalf of the appellant. It contains nine (9) grounds of appeal set out hereunder as follows:-

1. That the trial was not conducted according to law.

2. *That the trial Court Judges misdirected themselves in law and in fact.*
3. *That the trial Court convicted the appellant of the offence charged notwithstanding, that the prosecution evidence was riddled with contradictions, discrepancies and inconsistencies.*
4. *That the trial Court convicted the Appellant of the offence charged notwithstanding, that the prosecution did not disprove the alibi defence put forward by him.*
5. *That the trial Court convicted the Appellant of the offence charged notwithstanding, that he was not positively and clearly identified at the scene of crime.*
6. *That the trial Court convicted the appellant of the offence charged notwithstanding, that the evidence of PW5 upon which it based its decision was not corroborated as required under the provisions of Section 24 of the Evidence Act.*
7. *That the trial Court based its decision on the evidence of PW3 which had been expunged from the record.*
8. *That the Judge who took over from the one who heard the witnesses and recorded the evidence relied on Section 200 of the Criminal Procedure Code which did not apply to trials held in the High Court at the time the offence was committed, accordingly, he had no power to take over and continue with the trial, the only option to him was to make order for a fresh trial.*
9. *That the judge who pronounced the Judgment did not give adequate consideration to the evidence of the defence.*

On the date fixed for the hearing of this appeal, learned counsel **Mrs. Betty Rashid** and **Mr. A. Oyalo**, appeared for the appellant while learned counsel **Mrs. G. W. Murungi (SADPP)** appeared for the State. In her oral submissions to Court, **Mrs. Betty Rashid** faulted the prosecutions' evidence and urged us to allow the appeal arguing that PW1's evidence should not have been taken into consideration as the same had been expunged from the record; PW3, wife of the appellant was not a compellable witness hence her evidence should not have been accepted and taken into consideration by the Court; identification of the appellant by PW5 is in doubt as she did not describe how bright the moon was or the intensity of the light from the burning house and how far she was from that light; no explanation was given by PW5 how she managed to recognize the appellant who allegedly had covered his head with a hat. **Mrs. Rashid**, continued to argue that the prosecutions' case also stands faulted because there was no summing up to the assessors as was required by law; crucial witnesses who were in the company of PW5 and a **Mr. Mbindyo** in whose house PW1 slept were not called as witnesses; the learned trial Judge misdirected himself on the issue of appellants alibi by stating that it was raised at the very tail end of the case and yet the appellant had clearly indicated to the prosecution at the outset of the trial that he would be relying on an *alibi* defence. Lastly the appellant's trial which took over a period of three years infringed on his rights to a speedy trial.

Mr. oyalo on the other hand argued that since the appellant's trial was with the assistance of assessors, **Lenaola J** had no authority to take over the proceedings from **Wendoh J**. He should instead have commenced the proceedings *denovo* as Section 201 of the Criminal Procedure Code on which he relied to take over the said proceedings from where they had reached was introduced by amendment Act No. 1 of 2007 long after the proceedings complained of had taken place; the learned trial Judge fell into error firstly when he failed to address his mind to the need for corroboration of the evidence of PW5, a child of tender years, which could not have been corroborated by the dying declaration of the deceased which in law also requires corroboration.

The State has conceded the appeal. **Mrs. Murungi G. W** agrees with the appellants assertion that **Mwikali**, a crucial witness, was not called to testify; no explanation was given as to why she was not called to testify; PW5s' evidence required corroboration; the alleged evidence of a dying declaration was not corroborated and lastly that the learned trial Judge misdirected himself on the appellant's *alibi* defence

which had been raised at the commencement of the prosecution's trial and not at the tail end of the trial as stated by the trial judge.

On case law, the appellant relied on the decision in the case of ***Sekito Leko Versus Uganda [1967] EA531***, for the proposition that the burden of proving an *alibi* does not lie on the prisoner; ***Oloo s/o Gai versus Republic [1960]EA86*** for the proposition that a conviction stands faulted where the trial Judge fails to address the assessors on the danger of relying on the uncorroborated evidence of a child; the case of ***Pius Jasunga S/o Akumu versus Reginam [1954] 20IEACA 331*** for the proposition that caution should always be exercised by a Court of law before reception of a dying declaration as evidence to found conviction particularly as to identification of the assailants especially when the attack took place in the dark; the case of ***Shida Kasungu Baya and 4 others versus Republic Mombasa CRA No.273 of 2006*** for the proposition that evidence of a child of tender years requires corroboration except in sexual offences cases; and secondly that evidence that requires corroboration cannot be corroborated by another evidence which equally requires corroboration (approving ***Obiri versus Republic [1991] KLR 381*** and ***Kenya versus Republic [2002] 1KLR 257***); the case of ***Benard Kariuki & 4 others versus Republic Criminal Appeal No. 433 of 2007*** for the proposition that in a trial with assessors, the Court has to ensure that all the assessors are competent to sit as such assessors in terms of the provisions of Section 298(1); that these must sit throughout the proceedings; where one such assessor is found to be incompetent in the course of the trial, the selection process has to be restarted *denovo*; the case of ***Dickson Mwanik i M' Obici & a nother versus R epubli c Nairobi CRA 78 of 2006*** for the proposition that where the trial in the High Court has proceeded with the help of assessors; summing up to the assessors must be made by the Judge; the assessors have to render their opinions orally in Court as to the guilt or otherwise of any accused; the trial judge should record such opinions on the record and where the judge disagrees with the unanimous opinion of the assessors, the Judge should sufficiently explain reasons for disagreeing with that unanimous decision.***(Cherere Gikui versus Republic [1954] 21EA CA 304, Joseph Kabu versus Republic [1954] 2EACA 260 and Bwenge versus Uganda [1999] 1CA 25 approved)***

This being a first appeal, our mandate is as set out in rule 29(1) of this Court's Rules namely re-appraising the evidence and drawing inferences of fact on the guilt or otherwise of the appellant. See the case of ***Kariuki Karanja versus Republic [1986] KLR190*** wherein it was held *inter alia* that:

“ On a first appeal from a conviction by a Judge or a Magistrate, the appellant is entitled to have the Appellate Courts' own consideration and view of the evidence as a whole and its own decision thereon. The Court has a duty to re-hear the case and reconsider the materials before the Judge or Magistrate with such materials as it may have been decided to admit.”

We have on our own revisited the record of appeal as has been placed before us, re-assessed, re-analised, re-appraised and re-evaluated its content as against the findings of the learned trial Judge in the judgment sought to be impugned, on the one hand, and the concurrent submission of both learned counsel for the appellant and the State that the appellants' conviction stands faulted. We note from the record that the evidence of PW1 which had been expunged from the record and the evidence of PW3, an acclaimed wife of the appellant, were taken into consideration. The reception of PW3's evidence offended the provision of Section 127(2) 3 of the evidence Act Cap 80 Laws of Kenya, it provides thus in part:

“ 127(2) In Criminal Proceedings, every person charged with an offence and the wife or husband of the person charged shall be a competent witness for the defence at every stage of the proceedings, whether such person is charged alone or jointly with any other person.

Provided that; (i) (ii) (iii).

127 (3) In Criminal proceedings, the wife or husband of the person charged shall be a competent and compellable witness for the prosecution or defence without the consent of such person in any case where such person charged-

(a) With the offence of Bigamy.

(b) With offence under the Sexual Offences Act, or

(c) In respect of an act or omission affecting the person or property of the wife or husband of such person or the children of either of them and not otherwise”

The fact of death or injury to one’s parent does not fall within the exceptions in section 127(3) of the evidence Act (supra). It was therefore necessary for the Court to obtain the consent of both the appellant and PW3 before putting PW3 into the witness stand to testify against the appellant, her husband. Failure to take this precautionary measures was fatal to the prosecutions case.

Since at the time, the trial was with the aid of assessors, the learned trial Judges should have ensured strict compliance with the erstwhile provisions of Section 263, 298 (1) of the Criminal Procedure Code, with regard to the selection and competence to sit as assessors for the assessors who participated in the trial, before the start of the trial; ensuring attendance of all assessors at all times during the trial, summing up to the assessors at the end of the trial, recording on the Court record of the oral opinions rendered by each of the assessors respectively. Although we have traced on the record the initial empanelling of the assessors, we do not trace on the record the precautionary measures required by law being adhered to as regards the dropping and taking on other assessors. By precautionary measures, we mean no reasons were placed on the record. Summing up to the Assessors was also not done. All these were absent from the record. This non compliance was also fatal to the prosecutions’ trial.

PW5 having admittedly been a child of tender years, the learned Judges were obligated to comply strictly with the provisions of Section 19(1) of the Oaths and Statutory Declarations Act Cap 15 Laws of Kenya as regards the reception of the evidence of a child. It provides:-

“19(1) where in any proceedings before any Court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness, does not in the opinion of the Court or such person understand the nature of an oath his evidence may be received though not given on oath if in the opinion of the Court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence and understand the duty of speaking the truth; and his evidence in any proceedings against any person for any offence though not given on oath, but otherwise taken and reduced into writing in accordance with Section 233 of the Criminal Procedure Code shall be deemed to be a deposition within the meaning of that Section. “See the case of Onserio versus Republic [1985] KLR 618 wherein this Court held *inter alia* that:-

“Where a witness appears to be a child of tender years the Court should inquire whether the child was capable of understanding the nature of an oath and whether he was possessed of sufficient intelligence to justify the reception of his evidence though not given on oath”

Nowhere in the record do we find a *voire dire* examination conducted by the Court to determine PW5s’ ability to understand the nature of the oath and the obligation to speak the truth. Failure to comply with this requirement lessens the credibility of the evidential value of PW5’s evidence.

As for the need for corroboration for such evidence (of a child of tender years), the learned Judge appears to have assumed that corroboration was not required that notwithstanding, that PW5s evidence did not relate to a sexual offence. Section 124 of the evidence Act (supra) provides thus:-

“124 Notwithstanding, the provisions of Section 19 of the oaths and Statutory Declaration Act, where the evidence of alleged victim admitted in accordance with that Section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it corroborated by other material evidence in support. Thereof implicating him provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victims of the offence, the Court shall receive the evidence of the alleged victim and proceed to convict, the accused person if for reasons to be recorded in the proceedings the Court is satisfied that the alleged victim is telling the truth.

See also the case of *Johnson Muiruri versus Republic [1983]KLR 445* wherein this Court held *inter alia* that:-

“Where, in any proceedings before any Court, a child of tender years is called as a witness, the Court is required to form an opinion, on a voire dire examination, Whether the child understands the nature of an oath in which event unsworn evidence may be received. If the Court is not so satisfied, his unsworn evidence may be received if in the opinion of the Court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event, an accused person shall not be liable to be convinced on such evidence unless it is corroborated by material evidence in support thereof implicating him.

The learned trial Judge also failed to appreciate the need for the requirement for corroboration for an alleged dying declaration by the deceased to PW5. Section 33(a) of the evidence Act Cap 80 Laws of Kenya, permits admission of statements of persons either dying or in anticipation of death in instances where they are made by a person as to the cause of his death or as to the circumstances of the transaction which resulted in his death, in the cause in which the case of that person’s death comes into question. See the case of *Chege versus Republic [1985] KLR* for the proposition that, the general principle on which a dying declaration is admitted in evidence is that, it is a declaration made in extremity when the maker is at the point of death and the mind is induced by the most powerful consideration to tell the truth; the case of *Aluta versus Republic [1985] KLR543* for the proposition that, it is 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; the case of *Kihara versus Republic[1986]KLR473* for the proposition that, even though there is no rule that a dying declaration must be corroborated, a Court needs to caution itself that in order to obtain conviction upon a dying declaration, it must be satisfactorily corroborated and particular caution must be exercised as to when the attack took place; the identification of the assailant and the weapon used. **Secondly**, that before a dying declaration is relied upon, it has to be shown that death was imminent and was directly related to the incident.

The cardinal principles on the evaluation of evidence of recognition in uncondusive circumstances, namely, in the dark were not also adequately interrogated by the learned Judge. Efforts should have been made by the learned Judge to give reasons as to why he thought the moonlight and light from the burning house were condusive to positive identification of the assailant, by PW5, who in the circumstances of this case was a single witness. Secondly the inconsistencies in her evidence was also not sufficiently considered by the learned trial judge. See the case of *Anjononi versus Republic[1980]KLR 57* at page 60 paragraph G for the proposition that, ***“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”; the case of *Marie and 3 others versus Republic [1986]KLR224* for the proposition that, subject to certain well known exceptions, a fact may be proved by a single witness, but this rule does not oust the necessity for testing very carefully the evidence of a single witness especially when there is evidence that the conditions favouring a correct identification are difficult; the case of *Marube & another versus Republic[1986]KLR 356* for the proposition that though a fact may be proved by the testimony of a single witness, there remains the need to test with the greatest care the identification evidence of such a witness especially when it is shown that the condition favouring a correct identification were difficult.

See also the case of *Maitanyi versus Republic[1986]KLR 198* where it was held *inter alia* that

(1) Although it is trite law that 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 a single witness respecting identification, especially when it is known that the condition favouring a correct identification were difficult.

(2) When testing the evidence of a single witness a careful inquiry ought to be made into the nature of

the light, available conditions and whether the witness was able to make a true impression in description.

(3) The Court must warn itself of the danger of relying on the evidence of a single identification witness. It is not enough for the Court to warn itself after making the decision. It must do so when the evidence is being considered and before the decisions is made.

(4) Failure to undertake an inquiry of correct testing is an error of law and such evidence cannot safely support a conviction.

In the circumstances of this case in the absence of any inquiry having been made by the learned trial Judge as regards the possibility of any mistaken identity in the alleged recognition of the assailant by PW5, a single witness who failed to give a description of the intensity of the light and the distance from where she was to the exact spot of the murder, the possibility of her being frightened on seeing the deceased being cut and therefore getting confused could not be ruled out. It creates doubt as to whether PW5 really recognized the deceaseds' assailant or not.

Section 143 of the Evidence Act Cap 80 Laws of Kenya provides:- “***No number of witnesses shall in the absence of any provision of law to the contrary be required for the proof of any fact.***” The presence of this cardinal guiding principle notwithstanding, it was imperative upon the learned trial Judge to satisfy himself that the exclusion of the testimony of witnesses who would have otherwise supported and strengthened the prosecution’s case such as ***Mwikali*** who was alleged to have been in the company of PW5 a child of tender years, and was a bit older than PW5 would not have added weight to the prosecution’s case before allowing such evidence to be excluded. This was necessary to rule out the possibility of a deliberate withholding of material evidence from the Court. See the case of ***Bukenya and others versus Uganda [1972]EA 549*** for the proposition that, the prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent; the Court has the right and the duty to call witnesses whose evidence appears essential to the prosecution of the case, and lastly that where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution. Herein the absence of reasonable explanation for the non attendance of ***Mwikali***, leads to the only reasonable inference that had she been called, her evidence would probably have been adverse to the prosecutions case.

Turning to the appellants defence, if the learned trial judge had properly appraised himself of the content of the record, he could have noted the appellant raised that defence at the outset of the trial. The prosecution was thus given adequate warning as regards the need for its rebuttal by the prosecution which they never did. Meaning that it stood and once acceptance of that *alibi* stood the learned trial Judge had no option but to acquit the appellant, as non-rebuttal of that *alibi* leads only to one reasonable conclusion on the case, namely that the appellant had not been sufficiently identified and or recognized in connection with the commission of the offence. The appellants assertion that he was not at the *locus in quo* at the time of the occurrence of the offence was therefore not ousted by the prosecution.

We think we have said enough. The upshot of the above assessment is that the State rightly conceded the appeal. We therefore find merit in this appeal. We allow it in its entirety and set aside the conviction and sentence. We direct that the Appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Nairobi this 3rd day of October, 2014.

R.N. NAMBUYE

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JUDGE OF APPEAL G.B.M. KARIUKI

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JUDGE OF APPEAL

J.MOHAMMED

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

D/O