IN THE COURT OF APPEAL

AT NYERI

(SITTING AT NAKURU)

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

CRIMINAL APPEAL NO. 144 OF 2011

BETWEEN

VINCENT KIPKURUI KOECH …….……….……………… 1ST APPELLANT

DENNIS KIPCHIRCHIR ………………........……...……. 2ND APPELLANT

AND

REPUBLIC ……………………...........…………...……… RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nakuru (Emukule, J.)

dated 17th June, 2011

in

H.C.CR.C No. 16 of 2010)

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JUDGMENT OF THE COURT

1. The appellants herein were charged with the offence of murder contrary to ***Section 203*** as read with ***Section 204*** of the ***Penal Code*** at the High Court in Nakuru. The particulars of the charge were that on 11th February, 2010 at Esageri trading centre in Koibatek District within the then Rift Valley Province murdered Kelvin Kibiwott Ng'etich (deceased).

2. The appellants pleaded not guilty and the matter proceeded to trial. The prosecution called a total of seven witnesses in support of its case. It was the prosecution's case that on 12th February, 2010 at around 8:00 p.m. while PW1, Sylvester Kipkemoi Cheboiwo (Sylvester), a motorbike operator, was waiting for a customer outside a bar at Esageti, he saw the deceased carrying a Jeri can full of petrol and he offered to carry the petrol for him. The deceased informed Sylvester that he would walk to the stage and try to get another motorbike; that in the event he was not successful he would call Sylvester to carry the petrol. Thereafter, PW3, Justus Kipkurui Sirma (Justus) who was then in his shop saw the deceased run with a 5 litres Jeri can. He also heard a commotion outside his shop but ignored the same thinking it was donkeys. Thereafter, a motorbike passed by the shop and lit up the area. It is then that Justus saw the deceased

being attacked by three people. Justus called Sylvester who was about 20 metres away to come and help the deceased. When he arrived at the scene, Sylvester saw three men beating the deceased; when the assailants saw Sylvester they ran away. It was Sylvester's evidence that with the aid of light from a moving car he was able to see the deceased and recognize the assailants as the appellants herein and one Rono. According to him, the 1st appellant and Rono held the deceased while the 2nd appellant stabbed the deceased. Sylvester further testified that when he reached, the deceased who was lying on the ground, the deceased told him that it was the appellants and Rono who had attacked him. The deceased was taken to hospital by PW2, Moses Kipgogei Cheruiyot (Moses) and PW4, John Kipkurui Bonde (John). Unfortunately, the deceased passed away. PW5, Dr. Noah Oloo Kamidigo (Dr. Noah), testified that the post mortem conducted on the deceased revealed that the cause of death was hypo-volaeucic shock caused by sudden blood reduction due to a penetrating wound through the chest. The incident was reported to the police station and the appellants who were well known were arrested and charged.

3. The appellants gave sworn statements denying the offence they were charged with. The 1st appellant testified that he was a matatu driver; on 11th February, 2010 he was at work along Eldama Ravine/Nakuru road until 10:00 p.m. when he went home and slept. He woke up the following morning at around 6:00 a.m. and went to work. He was later arrested. It was his evidence that his brother one Pius Kiprono was also arrested 12 Km away; a crowd gathered around them and attacked them; his brother Pius Kiprono was stabbed to death by PW1. On the other hand, the 2nd appellant testified that on 11th February, 2010 he was at home with his parents; while they were eating dinner they had screams coming from the centre which was about 200 metres away. The following day at around lunch time they learnt that his brother, Pius Kiprono, had been killed for being a suspect over a certain murder. Fearing for his life, his parents took him to Eldama Ravine Police Station and asked the police to keep him for three days until the tension ended. However, he was charged with the offence of murder.

4. After considering the evidence on record, the trial court convicted the appellants and sentenced them each to 50 years imprisonment with no option of parole for the first 30 years. It is that decision that has provoked this appeal based on 11 homemade grounds which can be aptly summarized as follows:-

- ***The learned trial Judge erred in law and fact in failing to find that the prosecution had not proved its case to the required standard.***

- ***The learned Judge erred in law and fact in failing to find that the prosecution's evidence was full of contradictions.***

- ***The learned trial Judge erred in law and fact in failing to observe the intensity of the light from the moving vehicle.***

- ***The learned trial Judge erred in law and fact in making parole orders.***

5. Mr. Khobe, learned counsel for the appellants, submitted that the dying declaration was invalid because PW1, Sylvester, was not present when the deceased was taken to hospital. PW2, Moses, testified that the deceased was unconscious and could not speak. He further argued that PW7, Cpl Boniface Chebus (Cpl Boniface), the investigating officer, testified that Moses never indicated in his report that the deceased had made a dying declaration. He maintained that the trial Judge erred in finding that there was a dying declaration. Mr. Khobe further submitted that the conditions that were prevailing at the material time were not favourable for a positive identification of the assailants. This is because it was at night and Sylvester relied on the light from a moving vehicle; the learned Judge realized that the light was not sufficient therefore the evidence was shaky. Mr. Khobe urged us to allow the appeal.

6. Mr. Omutelema, Senior Assistant Director of Public Prosecution, in opposing the appeal, submitted that Moses recognized the appellants with the aid of pressure lamp and light from a moving vehicle. He argued that the said witness described the scene. According to Mr. Omutelema, Moses was a credible witness and his evidence was not challenged. He argued that there was no material contradiction in the evidence.

7. We have anxiously considered the record, the grounds of appeal, submissions by counsel and the law. This Court in ***Dickson Mwangi Munene & Another –vs- R – Criminal Appeal No. 314 of 2011*** expressed itself as follows:-

> ***"This being a first appeal, this Court is obliged to re-evaluate the evidence on record to determine if the trial court's decision was based on evidence and is legally sound. On matters of fact, as appellate court we have to bear in mind the caution that having heard and seen the witnesses testify, the trial court was better placed to assess their demeanor. We should therefore be slow to reverse the trial judge's finding of fact unless it is supported by the evidence on record."***

See ***Okeno –vs- Republic (1972) EA 32*** and ***Mwangi v. Republic (2002) 2 KLR 28.***

8. The appellants' conviction was based on recognition and a dying declaration. The trial court found that the recognition of the appellants by PW1, Sylvester, was free from error. The trial court on the issue of recognition stated:-

> ***"No sooner had the deceased gone than PW2 heard a commotion which he mistook for nosing of donkeys, but realized it was the deceased in mortal danger. He called PW1 (Sylvester), who rushed to the scene, only to find that the accused, and their brother had done their deed, two of them, had held the deceased on each side, while the brother Kiprono, did the actual stabbing of the deceased. They would have ensured that the deceased collapsed in their hands but for the appearance of PW1 who interrupted them, and they fled in a different direction, but not before PW1 had clearly seen them from the flashing light of a passing vehicle, not much perhaps, and not too long, but sufficient for PW1 to notice and observe and see that the attackers of the deceased were persons he knew and saw them very well."***

It is a well settled principle that evidence of visual identification in criminal cases can cause miscarriage of justice if not carefully tested. In the case of ***R –vs- Turnbull and others (1976) 3 All ER 549***, an English case, Lord Widgery C.J. had this to say:-

> ***"First, wherever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the Judge should warn the jury of the special need for caution before convicting the accused in reliance to the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Secondly, the Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and the actual appearance.***
>
> **………………….**
>
> ***Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."***

9. In this case recognition evidence was tendered by a single witness, PW1 (Sylvester). In ***Abdallah Bin Wendo -vs- R 20 E.A.C.A 166*** at page 168 thus:

> ***"Subject to certain well-known exceptions it is trite law that a fact may be proved by the***

testimony of a single witness but this rule 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 conditions favouring correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error."

10. PW3, Justus, was the first person to see the attack. Justus testified that the deceased and his assailants were fighting in a dark area. Sylvester testified that the incident occurred at night at around 8:00 p.m.; the area was dark. From the evidence it is clear that the prevailing circumstances were difficult. Sylvester testified that he was able to recognize the appellants with the aid of the light from a moving car. We believe that the light which Sylvester referred to was light from the car's headlights. It was therefore imperative for positive evidence to be tendered by Sylvester as to the intensity of the light from the said vehicle, its distance and position for purposes of determining whether the recognition was positive. In ***Maitanyi -vs- Republic (1986) KLR 198***, this Court at page 201 held,

> ***"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 light available. What sort of light, its size and it 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."***

No evidence of the aforementioned nature was tendered. We also note that Sylvester did not give evidence of the distance between him and the assailants when he recognized them. Was the evidence sufficient to warrant positive recognition of the appellants? In the circumstances we are unable to hold that the recognition of the appellants was proper and free from error.

11. ***Section 33 (a)*** of the ***Evidence Act*** provides partly as follows: -

> "***33. Statements, written or oral, of admissible facts made by a person who is dead …………are themselves admissible in the following cases:-***
>
> ***(a). 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."***

12. Did the deceased make a dying declaration in respect of the persons responsible for his death? Sylvester testified that on the material day when he went to assist the deceased, the deceased told him that it was the appellants who had attacked him. Sylvester did not tender evidence on whether the alleged declaration was made in the presence of any other person apart from himself. On the other hand we note that PW2, Moses, testified that the deceased was not able to talk. Cpl Boniface testified that when the matter was reported, PW2 (Moses), PW4 (John) and one Ezekiel Kimeli stated that the deceased was found lying unconscious and bleeding from the chest. From the aforementioned inconsistencies we are able to tell whether the deceased was conscious when Sylvester found him and whether indeed he made the dying declaration. We also cannot help but note that Cpl. Boniface, the investigating officer, testified that at no time did Sylvester mention that the deceased had made a dying declaration. We consequently find that there is no evidence of a dying declaration.

13. Having expressed ourselves as herein above we find that the prosecution failed to prove its case against the appellants. We find that the appeal herein has merit and is hereby allowed. Accordingly, we quash the conviction and set aside the sentence meted out against the appellants. We direct that the appellants be hereby set at liberty unless otherwise lawfully held. .

Dated and delivered at Nakuru this 27th day of November, 2014 .

ALNASHIR VISRAM

………………………

JUDGE OF APPEAL

MARTHA KOOME

…………………………

JUDGE OF APPEAL

J. OTIENO ODEK

……………………….

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR