**IN THE COURT OF APPEAL**

**AT NYERI**

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

**CRIMINAL APPEAL NO. 163 OF 2011**

**BETWEEN**

**SHADRACK MBAABU KINYUA……..…..……. APPELLANT**

**AND**

**REPUBLIC ……. RESPONDENT**

***(Appeal from the ruling of the High Court of Kenya at Meru***

***(Lessit,J.) dated 2nd June 2011***

***in***

***H.C. Criminal Case No. 14 of 2007)***

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**JUDGMENT OF THE COURT**

1. The appellant was charged with murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The Information is that on the 4th day of November 2006 at Chugu location in Meru Central District within Eastern Province murdered Eric Munene Kinyua. The appellant was tried, convicted and sentenced to death by the High Court. He has now appealed to this court.
2. By a supplementary memorandum of appeal, the appellant raises five grounds *to wit:*

i. ***That the learned Judge erred in law in finding the appellant guilty as charged on the basis of a dying declaration that had no basis.***
ii. ***That the learned Judge erred in law in finding the accused guilty as charged on the basis of voice recognition which was not free from error.***
iii. ***That the learned Judge erred in law in failing to make a finding that the evidence adduced by the prosecution was contradictory and inconsistent and thus not safe to convict.***
iv. ***That the learned trial Judge erred in law and fact in failing to critically analyze the appellant's defence against the prosecution case to the detriment of the appellant.***
v. ***That the learned Judge erred in law in finding that the prosecution had provided its case against the appellant beyond reasonable doubt yet the evidence on record did not support such a finding.***

3. The testimony of PW2 Fredrick Bundi was given in support of the charge. PW2 testified that he knew the deceased Erick Munene as they were neighbours. That on 4th November 2006 at about 9.30 pm he was in the company of the deceased and one Doughlas Mwirigi as they were coming from Mwrigi's home who they had gone to see. That on the way, they met the appellant who asked them why they were looking for him; the appellant was armed with a panga and a long knife/sword; the appellant tried to cut him but left a scar on his left side of the neck. That he and Doughlas ran away but the appellant stabbed the deceased in the abdomen and then ran away. That there were no other people within the vicinity. PW2 testified he was able to recognize the appellant because they talked; there was a bright moonlight; the appellant had a spotlight; the deceased had never indicated that a grudge existed between him and the appellant. PW2 testified he had known the appellant for three months but was not his friend; he never visited the appellant's home and never had any conversation with him except once at shop and on second occasion it was on the night of the offence. That when the appellant tried to cut him with the sword he faced him and so he recognized him. On cross examination about his statement to the police, PW2 admitted he did not refer to the torch and he did not mention that he saw the deceased being stabbed. PW 2 testified he was the one who went to look for a vehicle to take the deceased to the police and hospital.
4. PW1 John Gitonga M'ibiri testified that on 4th November 2006 at 9.30 pm, he heard screams from the neighbourhood and went to the direction of the screams; he found many people and was informed there was a body of a young boy (sic lady) who had been stabbed; he tried to give first aid but he was dead; he had lost all form of movement and could not speak; that he sent a young man to look for a vehicle to accompany the body to the police station. That there was light from several powerful security lights in his home and there was moonlight. That he did not find the appellant at the scene of crime; he later learnt the appellant was arrested but did not know the circumstances of his arrest.
5. The evidence relating to the dying declaration by the deceased was given by PW3 Japheth Kinyua Mukira. He testified that the deceased Eric Munene was his third born son; he knows the appellant. That on 4th November 2006 at about 9.30 pm while at his home he heard screams and as he went out to check he heard people say that Eric had been stabbed. He found Eric lying on the ground and he asked him "who has stabbed you" and he replied that "*Shadrack the son of Muthuiya*" had stabbed him. That he ran got a vehicle and took him to hospital but unfortunately he died on the way. That he was the first to arrive at the scene and PW1 came later; that he left PW1 at the scene as he went to look for a vehicle. That near the scene there was electric light from PW1's home but the light could not reach the scene and it was dark. On cross examination PW3 was asked why his statement to the police did not mention or include the dying declaration; he responded that perhaps due to panic and state of shock he did not tell the police.
6. PW4 Alex Mwiti testified that the deceased was stabbed at night and there was no light at the scene.
7. PW 5 Inspector of Police Harriet Kinya testified that the deceased had a stab wound on the head, upper right arm, neck and stomach. She stated that the initial report to the police was made by the deceased and two people who escorted him to hospital. The two people were Francis Mutethia and Alex Mwiti (PW4). The record reveals inconsistency as to who reported since PW5 further testified that the statement was from John Gituma and Japheth Mukira (PW3). In line with **Section 77** of the **Evidence Ac**t, PW5 produced the post mortem report by signed by Dr. Macharia of Meru Hospital. On cross-examination PW5 clarified that the deceased was at the report office with the reportees but he was not talking. The reportees said Shadrack stabbed the deceased in the stomach.
8. The appellant in his sworn testimony denied committing the offence and raised an alibi. He testified that he had been living in Kina since 2004 and on 4th November 2006 at 9.30 pm he was at Kina at his shamba and two days later he received a call from his mother that their houses had been burnt; that he went to Anti-stock theft police unit at Maua and reported the incident and he was placed in the cells for two months and later brought to Meru police station and kept in the cells for another 3 months. He was later informed that he was being held for killing Erick Munene.
9. At the hearing of the appeal, learned counsel **Muchiri wa Gathoni** represented the appellant while the Assistant Director of Public Prosecution **Mr. Job Kaigai** appeared for the state.
10. Counsel for the appellant elaborated on the grounds of appeal. He submitted that trial judge erred

in relying on a dying declaration that was neither made nor uttered by the deceased; that there was no dying declaration. He further submitted that the voice recognition and visual identification of the appellant by PW2 was not free from error and the defence and alibi of the appellant was not given due consideration. Counsel pointed out that the contradictions in the evidence led by the prosecution raised doubt as to the guilt of the appellant.

11. This being a first appeal, we are reminded of our primary role as the first appellate court namely, revisiting the evidence that was tendered before the trial Judge, analyzing the same independently and then drawing conclusion bearing in mind the fact that we neither saw nor heard the witnesses and make an allowance for that. See the case of ***Muthoka and Another, versus Republic (2008) KLR 297***. ***In OKENO V. R. [1972] EA 32 at p. 36*** the predecessor of this Court stated:-

***"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (PANDYA V. R. [1957] EA 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (SHANTILEL M. RUWAL V. R. [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses, see PETERS -V- SUNDAY POST [1958] EA 424.".***

12. We have reassessed the evidence on the record, the grounds of appeal presented to us for determination by the appellant as well as the rival arguments presented by both sides. The evidence against the appellant is primarily by PW2 Fredrick Bundi who states that he was an eye witness**.** In ***Wamunga vs. Republic, (1989) KLR 424*** this Court held at page 426:

***"..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 a conviction."***

13. PW2 testified that he recognized the appellant both visually and by voice. We shall analyze each of these two modes of recognition separately. The offence was committed at 9.30 pm and it was dark; PW1, PW2 and PW3 all testified that there was moonlight. PW1 testified that security light from his home lit the scene; PW2 testified that there was moonlight and he recognized the appellant, he also testified there were no other persons at the vicinity; PW3 testified that near the scene there was electric light from John Gituma's home but the light could not reach the scene and it was dark; PW 4 testified there was no light at the scene; PW5 testified that there was no lighting system at the scene.

14. Evidence of visual identification should always be approached with great care and caution **(see *Waithaka Chege – v- R, {1979} KLR 271)***. Greater care should be exercised where the conditions for a favourable identification are poor and where identification is by single witnesses **(*Gikonyo Karume & Another – v – R, {1900} KLR 23)*.** In the instant case, we note that without proper caution, a possibility of error or mistake could exist as it was night and the only source of light was moonlight and the electricity security lights from PW1's home. From the evidence on record, the offence was committed at 9.30 pm at night. According to PW 1, PW 2 and PW 3 it was dark. The source of light as per PW 1 was the security light from his house; the source of light as per PW2 was moonlight; PW3, PW4 and PW5 testified it was dark. That being the scenario, it is difficult for us to fathom that only PW2 was able to see and identify or recognize the appellant. It is our view that it is this kind of scenario that calls for the trial judge to be extremely cautious before she can enter conviction based on identification of an accused person at night and in difficult circumstances. It has been held that before a court can return a conviction based on identification of any accused person at night and in difficult circumstances, such evidence must be water tight. **(See *Abdalla bin Wendo & Another – v- R, {195} 20 EACA 166; Wamunga – v- R, {1989} KLR 42; and Maitanyi – v- R, 1986 KLR 198)*.** It is required that before acting on such

evidence, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him subsequently. Failure to undertake such enquiries is an error of law and fatal to the prosecution. We have examined the record and agree with the trial judge that the conditions for correct visual identification were not favourable and positive. The trial Judge was correct in holding that unless there was other evidence to support visual identification by PW2, the evidence of identification by PW2 could not be relied upon.

15. We note from the record that the prosecution did not call Doughlas Mwirigi to testify in this case. PW2 testified that he was walking with Doughlas and it is our considered view that the investigating officer should have taken a statement from Doughlas. We are aware that under **Section 143** of the **Evidence Act**, the prosecution is not obliged to call any given number of witnesses but from the facts of this case, it would have been prudent to take a statement from Doughlas who was at the scene of crime and perhaps an eye witness.

16. As regards voice identification, in ***Karani vs. Republic, (1985) KLR 290*** this Court held at page 293:

***"Identification by voice nearly always amounts to identification by recognition. Yet here as in any other cases care has to be taken to ensure that the voice was that of the appellant, that the complainant was familiar with the voice and that he recognized it and that there were conditions in existence favouring safe identification."***

17. PW2 testified that he had only known the appellant for three months; that they never used to talk, that during the three month period, they had only talked twice and he was not a friend to the appellant and never visited each other. The issue that we ponder is whether it is possible to recognize free from error the voice of a person whom you have known for only three months, you do not interact with him; he is neither your friend nor an acquaintance; you have only talked to him once before and the second time during the alleged offence and in both instances the conversations do not exceed one sentence in length. In ***Anjononi & Others vs Republic, (1976-80) 1 KLR 1566*** at page 1568 this Court held,

***"…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."***

18. In our evaluation, the antecedents and interaction between PW2 and the appellant does not make us believe that PW2 did recognize the voice of the appellant. PW2 testified that there was little or no familiarity between him and the appellant; conversation was only on two occasions. From the testimony of PW2, there is no cogent and convincing evidence that he knew and was familiar with the voice of the appellant; the evidence of voice recognition given by PW2 is weak and insufficient to identify the appellant.

19. We now address the issue of the dying declaration. It is the appellant's contention that no dying declaration was ever made by the deceased. The reasons for this submission were given as follows:

i. ***PW 3 is the only witness who testified that the deceased uttered a dying declaration; PW3 was not the first person at the scene of crime; there were other people at the scene; how come PW3 is the only person who alleges that a dying declaration was made?***
ii. ***In his statement to the police, PW3 never mentioned or indicated that a dying declaration was made; the first time he referred to the dying declaration was when he testified in court.***
iii. ***PW3's testimony is contradicted by other witnesses. For instance, PW3 testified that he was the first person at the scene of crime while PW1 testified he himself was the first at the scene; the contradiction is augmented by PW3's further testimony that he was the one who looked for a vehicle to take the deceased to the police station while PW2 testified that it was he would fetched the vehicle and PW1 testified he sent a young person to fetch a vehicle; by all standards PW 3 is not a young person.***

20. We have considered the submission by the appellant challenging the existence and utterance of the dying declaration. If we find that a dying declaration was indeed made, the issue of its admissibility and the weight to be attached is well captured in the case of ***Pius Jasunga s/o Akumu – v – R, (1954) 21 EACA 333***, where the predecessor of this court stated:

***"The question of the caution to be exercised in the reception of dying declarations and the necessity for their corroboration has been considered by this court in numerous cases and a passage from the 7th Edition of Field on Evidence has repeatedly been cited with approval..... It is not a rule of law that in order to support a conviction there must be corroboration of a dying declaration (R-v-Eligu s/o Odel & Another (1943) 10 EACA 9) and circumstances which go to show that the deceased could not have been mistaken in his identification of the accused..... But it is generally speaking, very 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."***

21. We have considered and re-evaluated the testimony of PW3 in light of the decision of **Pius Jasunga s/o Akumu** and in light of the evidence from other prosecution witnesses particularly PW1 and PW2. None of these witnesses who were at the scene mentioned a dying declaration having been made by the deceased. PW1 testified that when he arrived at the scene the deceased could not speak. All witnesses testified that there were other people at the scene; how come it is only PW3 who heard the dying declaration? The learned trial Judge expressed herself that "***I found that the deceased spoke to his father alone without contribution from PW2 (and this) gives further credence to his dying declaration***." With due respect, we disagree; the trial judge should have considered that there were other people at the scene of crime and the deceased's father was not alone. If the dying declaration was indeed made, how come no other person at the scene heard it? It is our view that it is very unsafe to base the conviction of the appellant solely on the alleged dying declaration in the absence of satisfactory corroboration. We have considered that PW3 did not mention the dying declaration in his statement to the police and we are unable to find any independent evidence on record that corroborates the existence and contents of the dying declaration. We entertain some doubt whether the dying declaration was indeed uttered by the deceased. We give the benefit of doubt to the appellant.
22. We have considered the defence testimony and the alibi raised by the appellant; as already stated the prosecution did not lead evidence to identify the appellant as the perpetrator of the crime to the required standard; consequently, we see no need to comment on the defence testimony and the alibi raised except to state that when an alibi is raised, the burden to disprove the alibi rests with the prosecution and in the present case, no evidence was led to challenge the alibi.
23. The totality of our evaluation of the evidence on record and the applicable law is that we are inclined to allow this appeal, as we hereby do and quash the appellant's conviction. We set aside the death sentence meted out and accordingly, we direct that the appellant be set at liberty forthwith unless otherwise lawfully held.

***Dated and delivered at Nyeri this 3rd day of October, 2013.***

***ALNASHIR VISRAM***

**……**

***JUDGE OF APPEAL***

***MARTHA KOOME***

**…….**

***JUDGE OF APPEAL***

***J. OTIENO - ODEK***

**……..**

***JUDGE OF APPEAL***

*I cerify that this is a true copy of the original.*

**DEPUTY REGISTRAR**