



IN THE COURT OF APPEAL

AT NYERI

(SITTING AT MERU)

(CORAM: VISRAM, KOOME & OTIENO-ODEK JJA)

CRIMINAL APPEAL NO. 19 of 2013

BETWEEN

JACKSON KAIRIAMA APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from the ruling of the High Court at Meru (Lessit, J.)

dated 2nd January, 2012

in

H.C. Cr. Case No. 30 of 2004)

JUDGMENT OF THE COURT

1. The appellant, Jackson Kairiama, was charged with murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The Information is that on the 22nd day of November, 2003 at Mbayo village in Nathu location in Meru North District within Eastern Province, he murdered Silas Kanuu. The appellant was first arraigned before court on 20th May, 2004 and he was tried, convicted and sentenced to death by the High Court (**Lessit. J**). He has lodged this first appeal to this Court.
2. By a supplementary memorandum of appeal dated 17th October, 2013, the appellant raises ten (10) grounds *to wit*:
 - i. *The learned Judge erred on a point of law in failing to select the assessors at the commencement of the case and in failing to indicate on the court’s record the names of the assessors and their age hence rendering the trial a nullity.*
 - ii. *The learned Judge erred on a point of law and fact in shifting the burden of proof to the appellant.*
 - iii. *The learned Judge erred on a point of law in his ruling on whether the accused had a case to answer when he made a finding that the appellant had committed the offence and that the*

- deceased had died from the appellant's acts and deeds despite his plea of not guilty.*
- iv. *The learned judge erred on a point of law and fact in failing to carefully test the evidence of identification and in making a finding that the appellant was sufficiently identified as the person who committed the offence.*
 - v. *The learned judge erred on a point of law and fact in relying on the evidence of PW 1 regarding a confession which was made by the appellant and which confession is not admissible.*
 - vi. *The learned judge erred on a point of law in disregarding the defence of the appellant.*
 - vii. *The learned judge erred on a point of law in relying on the evidence of PW 4 and PW 5 regarding the threats which the appellant is said to have issued against the deceased.*
 - viii. *The learned Judge erred on a point of law in making a finding that the appellant had premeditated to murder the deceased.*
 - ix. *The learned judge erred on a point of law in making a finding that the prosecution had proved its case against the appellant.*
 - x. *The learned Judge erred on a point of law in convicting the appellant on the evidence of PW 4 and PW 5 whose evidence was of the weakest kind.*
3. At the hearing of the appeal, the appellant was represented by Ms J. K. Ntarangwi while the State was represented by learned counsel N. Ongige.
 4. The testimony in support of the charge against the appellant was given by **PW 1 Silas M'mpwi M'Amachia**. The witness testified as follows:

“I recall on 22nd November, 2003 at about 7.30 pm. I was at Mbayo market. I was sitting at the canteen belonging to one M'Arimba. I was just outside the canteen which was not open. I was with Silas Kanuu, the deceased. We sat out there with Kanuu for about ten minutes as we were discussing miraa business. In the course of our discussions, Kaiso came and greeted us. Kaiso is that man in the dock. I have also heard people call him Jackson Kaiso Kairiama. The accused came and greeted us. I have known him before as he is from our village. The accused is the brother of Kanuu, the deceased. After the greeting, the accused fired at us. The accused was about 3 paces from us. He shot me twice but I do not know how many shots he fired at the deceased. After the shooting, I fell down a little while later away from the scene. The deceased fell at the scene. I was shot on the stomach and on the right rib cage. I was still able to identify the accused from the voice when he greeted us. I was able to see him because it was not all that dark. There was moonlight which was enough to enable me see the accused. The moonlight was bright. It had risen above the horizon. There were no clouds and I could have seen somebody twenty feet away. On 23rd November 2003, while I was admitted to hospital the accused came to see me and he told me he was sorry and that it was by bad luck that he shot me. The words he used were to the effect that he shot me by bad luck and he then gave me Ksh. 50/=. After the accused gave me Ksh. 50/-, he told me that before I leave hospital, the accused would have known the person who shot me. The accused did not mention anything to do with the deceased who was his brother”.

5. **PW 2 Stephen M'Miaka** testified that he owns a small shop at Mbayo market and on the material day 22nd November, 2003, while in his shop at about 7.30 pm he heard five gun shots from outside. When he heard the gun shots he tried to close his shop but he could not lock the door as he was afraid. After closing the door, he stayed indoors for a while and then went outside and he saw the person called Jackson Kaiso standing five steps away from the shop armed with a gun. Kaiso is the accused; he was able to identify the accused because there was moonlight; he had known the accused for over 15 years; he saw the accused armed and running away. He said he came face to face with the accused as the accused was running and negotiating a corner near PW2's shop. He saw the accused about 10 metres away and he was facing him. That he did not take more than a minute to close the door but as soon as he recognized the accused he closed the door. That he remained in the shop and heard noises from outside. He came out and saw the body of Silas Kanuu the deceased who was known to him. He learnt that Silas M'Impwi had also been shot.

6. **PW3 John Kobia** testified that on 22nd November, 2003 at about 7.30 pm he was inside his shop and he heard gun shots. He ran away from the shop through the rear door and ran towards a shamba which was 15 metres away. While running, he saw Kaiso carrying a gun; there was moonlight and Kaiso is his neighbour. The accused wore a white cap and had a long black coat. He then heard screams shouting for help and he saw Silas M'Mpwi had been shot in the stomach.
7. The appellant gave a sworn testimony in his defence and raised an alibi. He stated that on 22nd November, 2003, at about 5.00 pm he was coming from the town of Mutuati and it was raining heavily. He entered a canteen belonging to the area Chief Marko Limange; he stayed in the canteen till 10.00 pm as the rain continued to pound; he was encouraged by the Chief to sleep in the canteen and he slept there. The next morning 23rd November, 2003, he met people who were saying a person had been killed in Mbayo. When he went home he learnt that it was his brother who had been murdered. He was arrested for the murder of his deceased brother and held in custody for 46 days before being arraigned in court. He testified that the neighbours who gave evidence against him were false witnesses. The appellant called **DW 2 Marko Limange** who gave sworn evidence to the effect that on 22nd November 2003 between 5.00 and 6.00 pm it was raining and some people including the appellant had shielded themselves from the rain in his canteen. That at about 11.00 pm as the rain continued, he told the appellant to spend the night at the canteen. The appellant obliged and he spent the night in the canteen. That the following day he learnt that Kanuu had been shot dead. He left the police to do the investigation.
8. The appellant in his memorandum of appeal take issue with the testimony of **PW4 Regina Kabiru** and **PW5. Martha Krwito**. PW 4 testified that both the deceased and the appellant are her uncles. That on 22nd November, 2003, her son informed her about the shooting at 7.00 pm but she did not go out to check. That on 23rd November, 2003, the appellant told her that he would have arrested the people who killed the deceased if the family had not annoyed him. She inquired from the appellant who had killed the deceased and he responded he did not know. PW5 testified that the appellant was her brother and on 3rd October, 2003, when their father died, the appellant had intimated that he would kill somebody. He stated he would kill Kanuu, their younger brother because of land disputes. She took this matter seriously and informed her mother who is also mother to the appellant. Their mother responded that if the appellant wanted to kill Kanuu that is okay. On 23rd November, 2003, PW 5 testified that she sent Regina Nchororo, a lady from her home area to visit her home. Two days later the lady came back and told her that Kanuu had been killed. PW 5 testified that she then realized that Jackson, the appellant, had done what he had told her he would do. She travelled home and went to see the Chief and informed him about the story the appellant had told her.
9. Counsel for the appellant **Ms J. K. Ntarangwi** elaborated on the grounds of appeal and focused on the alleged nullity of the trial because assessors were not properly selected as neither their names nor ages appeared on record. It was submitted that on 8th June, 2005, the trial court made an order that the Deputy Registrar should summon at least five potential assessors for selection on 26th September, 2005. That on 26th September, 2005, when the hearing of the case commenced before the trial court, the record reflects that there were assessors in court but their names or ages are not on record. The court proceedings for 26th September, 2005, show that the accused stated he had seen assessors in court and he had no objection to their being appointed as assessors in the case. It was submitted that at the resumed hearing on 27th September, 2005, 28th September, 2005 and 28th March, 2006, the record reflects that assessors were present but their names are not given. Counsel for the appellant submitted that on 24th July, 2006, the record reflects that there were two assessors in court and their names are given as Mary Kathure Mugambi and Susan Wangui Kaburu. On this date, the prosecution raised concern that there were only two assessors in court instead of three. Counsel for the appellant submitted that it is at this stage that it becomes apparent from the record that there were three assessors in the case and one was absent.
10. Ensuing from the record as stated, counsel for the appellant submitted that the irregularities in relation to assessors made the trial a nullity as no reason was given to support the discharge of the third assessor whose identity remains unknown. Further, it was submitted that the trial was a nullity as the names and ages of all the three assessors who participated in the trial were not recorded from the beginning. Counsel cited the case of ***Bernard Kariuki & 4 others – v- R***,

Criminal Appeal No. 433 of 2007 where this Court differently constituted held that assessors must not only be competent to sit, but their number should mandatorily be three. That when a trial opens, the court should have three qualified assessors and Section 298 (1) of the Criminal Procedure Code would properly be invoked in the course of trial where an assessor absents himself and is discharged. This court stated that if an assessor is not competent to sit, the proper course is to stop the proceedings and order the trial to commence *de novo*. The State through learned counsel N. Ongige submitted that the two assessors who gave their opinion were properly selected and were present during the entire hearing of the prosecution and defence witnesses.

11. In opposing the appeal, learned counsel N. Ongige for the State, submitted that the evidence of PW1 and PW 2 was not shaken. That PW 1 identified the appellant visually and through voice recognition; that PW 1's testimony is corroborated by both PW 2 and PW 3 and the trial court examined the PW1 and PW 2 about the brightness of the moon. The State submitted that the alibi defence raised by the defence was considered and found worthless.
12. 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.”

13. 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 **PW 1 Silas M'mpwi M'Amachia** who testified that it was the appellant who shot him and the deceased. To this extent, PW1 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.”

14. We have perused the record and are satisfied that the names and ages of the assessors were not recorded when the trial opened. We are also satisfied that when the third assessor was absent, the record does not indicate the reasons for his discharge. To this extent, the trial of the appellant was flawed. The issue now before us is whether a retrial should be ordered. We have perused the record of appeal. Ordering a retrial due to the flaw in recording the names of the assessors and their ages will not serve the interest of justice. In addition, we have re-evaluated the evidence on record and the testimony of all prosecution and defence witnesses. The record is clear that the two assessors who gave their opinion sat throughout the proceedings and heard the prosecution and defence witnesses. It is our considered view that no injustice was occasioned to the appellant due to failure to give the names and age of the assessors. We decline to order a retrial and we now proceed to re-evaluate the entire evidence on record and submissions by both counsel.
15. PW1 testified that he recognized the appellant both visually and by voice. He testified that there was moonlight and it was enough for him to recognize the appellant whom he knew. He also stated he identified the appellant from his voice when he greeted them. The offence was

committed at about 7.30 pm and it was dark. PW1, PW2 and PW3 all testified that there was moonlight; they all gave a consistent description of how the appellant was dressed and that he wore a white cap and had a long black coat. 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).

16. In the instant case, we note that the identification and recognition of the appellant was by three different witnesses and we discount any possibility of error or mistake. All the three witnesses testified that there was moonlight which was enough to see the appellant. This Court has often 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.
17. We have examined the record and it is clear that the trial Judge did examine the evidence as to the brightness of the moonlight. We find that the trial Judge did not err in holding that the moonlight was sufficient for identification and recognition of the appellant as the person who committed the offence.
18. On the issue of 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.”

19. PW1 testified that he has known the appellant for a long time and he knew his voice. The issue that we ponder is whether voice recognition as alleged by PW1 is free from error. We are of the considered view that the visual recognition of the appellant by PW1 as corroborated by PW2 and PW3 removes any doubt that might have existed in relation to voice recognition.
20. We now consider the *alibi* raised by the appellant. It is the duty of the prosecution to disprove the *alibi*. What evidence is on record to prove or disprove the *alibi*? PW1, PW2 and PW3 were all eye witnesses who placed the appellant at the scene and time of crime which was around 7.30 pm. The testimony of all the three witnesses is credible and consistent. The three witnesses were not at the same place at the same time. PW 1 saw the appellant as he committed the crime, while PW 2 and PW 3 saw him run away from the scene of crime. DW 2’s evidence is that the appellant slept at his canteen. DW 2 does not give evidence as to where the appellant was at 7.30 pm which was the time of the offence. The appellant in his defence states that when he reached the canteen, he found the wife of DW 2 and thereafter DW 2 came. We have weighed the testimony of PW1, PW 2 and PW3 against the testimony of DW 1 and DW 2. If we were to believe the evidence of DW 2, it does not establish where the appellant was at 7. 30 pm. DW 2’s evidence does not corroborate the whereabouts of the appellant between 5.00 pm and 7.30 pm. The appellant states that he entered the canteen of DW 2 at 5.00 pm. This testimony is not corroborated by DW 2 who was not present at the canteen at that time. The weight of evidence tilts heavily against the *alibi* and we find that the *alibi* as raised by the defence does not dislodge the prosecution case which squarely and without any doubt places the appellant at the scene of crime.
21. Finally, the appellant contended that the trial court erred in relying on the testimony of PW 4 and PW 5. We have reproduced the essential elements of the testimony of these two witnesses and we find that their evidence was geared towards proving the motive for the attack. In light of the eye witness account by PW1, PW2 and PW3, we are of the considered view that the testimony of PW 4 and PW 5 even if excluded do not affect the identification, recognition and conviction of the appellant. Likewise, the alleged confession by the appellant to PW 1 even if excluded does not affect the identification, recognition and conviction of the appellant. The corroborative testimony

of PW1, PW 2 and PW 3 proves the prosecution case against the appellant beyond reasonable doubt.

22.The totality of our evaluation of the evidence on record and the applicable law is that we are inclined to dismiss this appeal, as we hereby do. We confirm the conviction and sentence meted out upon the appellant.

Dated and delivered at Meru this 28th day of November, 2013.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

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JUDGE OF APPEAL

OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR