



IN THE COURT OF APPEAL

AT NYERI

(SITTING AT MERU)

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

CRIMINAL APPEAL NO. 305 OF 2011

BETWEEN

STEPHEN MUTURIA KINGANGA.....APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Meru

(Lessit, J) dated 15th December, 2011

in

H.C.CR No. 23 OF 2008)

JUDGMENT OF THE COURT

1. Stephen Muturia Kinganga was charged with murder contrary to **section 203** as read with **Section 204** of the **Penal Code, Cap 63** of the **Laws of Kenya**; in that on the 4th day of March, 2008, at Kilalai Village, Amwathi sub-location Maua Location in Igembe District within Eastern Province murdered Ibrahim M'Mauta M'Elinge. The appellant was tried and found guilty by the High Court (**Lessit J**). He was sentenced to death as provided by law.
2. The learned Judge in convicting the appellant expressed herself:

“In this case, the deceased had just had a discussion with PW3 and had just parted when he was attacked. Immediately he was stabbed, he went to PW1’s gate and in a pleading for help and urgent tone stated:

“Chief, please help me not to be killed by Muturia”.

I find that the deceased had a good opportunity to see and identify his attacker. He still was able to get to PW 1’s gate to seek intervention. Thereafter, when the deceased fell

down “overwhelmed” by his injuries, he still repeated to PW1, PW 2 and PW 6 who had stabbed him. These latter statements were dying declarations. Considering the initial statement of the deceased for help identifying who was attacking him, and the circumstances under which it was made, I find that the deceased could not have been mistaken of the identity of his attacker. The fact that the accused was not a stranger to the deceased as they were neighbours and lived for many years in the same village removes any uneasiness to the deceased ability to correctly identify his attacker”.

3. Aggrieved by the conviction and sentence passed by the learned Judge, the appellant has moved to this court citing six grounds of appeal.
 - i. *That the learned judge erred in law and fact by convicting the appellant while relying on contradicting and insufficient evidence.*
 - ii. *The learned judge erred in law and fact in relying on circumstantial evidence*
 - iii. *The honourable judge erred in law and fact in relying on a dying declaration of the deceased.*
 - iv. *The learned judge erred in law and fact in relying on hearsay evidence.*
 - v. *The learned judge erred in law and fact in convicting the appellant without proof of mens rea.*
 - vi. *The learned judge erred in law and fact by disregarding the accused’s defence.*
4. At the hearing of appeal, learned counsel **Mr Wamache AMOS** appeared for the appellant while learned counsel **Mr. Job KAIGAI**, the Assistant Director of Public Prosecution appeared for the State. Counsel for the appellant elaborated the grounds of appeal and submitted that the key issue relates to the evidence of a single identifying witness and lack of corroboration of the alleged dying declaration. Counsel submitted that *mens rea* was not proved and the differences between the appellant and the deceased were ignored by the trial court. He submitted that the *alibi* raised by the appellant was not considered by the trial court. The appellant questioned the lighting conditions prevailing at the time of the offence submitting that the lighting was poor and insufficient for a positive identification of the person who attacked the deceased. Counsel cited the case of Masaku – v- R, Mombasa Criminal Appeal No. 103 of 2005 and Ndurya – v- R, Mombasa Criminal Appeal No. 446 of 2007 and urged this court to set the appellant at liberty.
5. The State through the Assistant Director of Public Prosecution **Mr. Kaigai** opposed the appeal. He submitted that the deceased had made a valid dying declaration with sufficient clarity. That **PW 5 Esther Muthoni** was an eye witness to the circumstances under which the appellant attacked the deceased. That the attack meted upon the deceased by the appellant was savage and it falls within the definition of *mens rea* in **Section 206 (a)** of the **Penal Code**. The State submitted that the *alibi* of the appellant was duly considered by the trial court and the said *alibi* did not dislodge the watertight prosecution case. As regards the other grounds of appeal pertaining to lighting conditions, the State submitted that this was neither here nor there as the dying declaration was recognition and proof of identity of the attacker.
6. This is a first appeal and we are obligated to remind ourselves of our primary role on this first appeal namely, to re-evaluate, re-asses and re-analyse the evidence that was before the learned trial judge and then arrive at our own conclusions giving reasons for the same. *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."

7. We have considered the grounds of appeal and submissions by counsel. We have examined, considered and re-evaluated the evidence afresh. The appellant takes issue with the evidence of **PW 5 Esther Muthoni** as a single identification 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."

8. **PW5 Esther Muthoni** who is a daughter to the deceased testified as follows:

"Ibrahim M'Mauta, the deceased was my father. I sell fruits in the market. I know Stephen Mutoria who is a neighbour. On 4th March 2008, I was coming from the market at 7.00 pm. As I went home, I heard screams from Ibrahim's home; he was on the road near home. I ran to the scene to see and I drew near. I found Stephen Mutoria chasing Ibrahim. Stephen held Ibrahim and started pushing him. I heard my father scream and say "Chief, please help me not to be killed". The accused had a panga. When I drew nearer my father, he had a cut on the front neck, forehead and right side of the stomach. I did not see Stephen cut Ibrahim. My father was bleeding. When I saw it, I ran to my house and fainted. I was in shock; I stayed there until the next day when I heard that my father had died. By the time I left the scene, no one had come to my father's help. I ran home to avoid being killed as I did not know the reason for the attack"

9. **PW6 Frida Kanaru** testified as follows:

"That on 4th March 2008 at around 7.00 pm, I was at home with my father Charles Meme PW 1 and my mother when we heard screams and somebody opened the gate and entered the homestead. Together, myself, my father and mother came out and found the deceased Ibrahim M'Mauta. He had cuts on the forehead and stomach. I asked the deceased who had cut him. He responded that it was Stephen Mutoria Kinganga. He did not say why he was cut but when he mentioned the name I knew who had cut him as Stephen Mutoria Kinganga is a neighbour. We started screaming and neighbours came; they took Ibrahim to hospital and I learnt the following day that he had died"

10. **PW1 Charles Meme** testified as follows:

"I do recall on 4th March 2008 at 7.15 pm. I was in my house and I heard a voice calling from far saying "Chief, come and assist me. I have been cut". I went out of my house and found the deceased opening my gate. He fell down in my compound. The deceased told me he had been cut by Stephen Mutoria. I recognized the name the deceased mentioned. The deceased had a cut across the abdomen. I learnt about his death one hour after he was taken to hospital"

11. **PW 2 Sussana Thirinda** the wife of the deceased testified as follows:

"On 4th March 2008 at 7.00 pm I was in the kitchen when I heard screams. I went outside and found my husband; he had cuts on the head, face and abdomen. He told me that the son of Kinganga called Mutoria was the one who

cut him. My husband did not give me the reason why he had been cut”.

12. The key issue in this appeal relates to the dying declaration made by the deceased. This Court stated in Jabane v Olenja, [1986] KLR 661 at pg 664, thus:

“...this court has held that it will not lightly differ from the findings of fact of a trial judge who had had the benefit of seeing and hearing all the witnesses, and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did – see in particular Ephantus Mwangi v Duncan Mwangi Wambugu (1982-88) 1 KAR 278 and Mwanasokoni v Kenya Bus Services (1982-88) 1 KAR 870.”

9. **PW1, PW 2 and PW 6** all testified that the deceased had mentioned the appellant as the person who cut him. On the other hand, **PW 5 Esther Muthoni** did not see the appellant cut the deceased but she witnessed the appellant chasing and pushing the deceased. The time was around 7.00 pm. As regards the testimony of PW 5, the issue is one of recognition. Did PW 5 recognize the appellant as the person who was chasing and pushing the deceased or could she have been mistaken. We are satisfied that PW 5 knew the appellant who was a neighbour and there is no issue of mistaken recognition. PW 5 heard screams and went to the scene and found the appellant pushing the deceased. We are satisfied beyond reasonable doubt that PW 5 recognized the appellant.

13. The appellant contends that the learned judge erred in treating the statement by the deceased to PW1, PW 2 and PW 6 as dying declarations. The appellant further states that the statement by the deceased is hearsay evidence as should be disregarded. It is a basic rule of admissibility of evidence that a dying declaration is an exception to the hearsay rule. We have looked at the statement made by the deceased to PW1, PW2 and PW6 and we find that it is a dying declaration within the meaning of **Section 33 (a)** of the **Evidence Act, Cap 80** of the **Laws of Kenya**. The relevant Section provides:

“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 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;”*

10. This Court has considered the above provisions in several cases. In Pius Jasunga s/o Akumu – v – R, (1954) 21 EACA 333, 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.”

11. Our evaluation of the evidence on record reveals that the learned Judge did not appreciate that the statement made by the deceased to PW 6 amounted to a dying declaration and consequently the trial Judge was expected to caution himself as is required by the case of Pius Jasunga s/o Akumu – v- R, (*supra*). We have evaluated the evidence on record and taken caution that the statement by

the deceased to PW1, PW 2 and PW 6 amounted to a dying declaration. We are satisfied that there is no question of mistaken identity since the deceased and PW 1, PW 2, PW 5 and PW 6 all knew the appellant as they were neighbours. The statement of the deceased to PW1, PW 2 and PW 6 is consistent and corroborated with the eye witnesses' account of PW 5 (**Esther Muthoni**). We find that the statement by the deceased is admissible under **Section 33 (a)** of the **Evidence Act** and the learned judge did not err in admitting the same in evidence.

12. The appellant in his defence raised an alibi. He testified that between 1st March, 2008 and 5th March, 2008, he was at Kiengoo area harvesting *miraa* and he was living in the shamba with Joel Kimathi (DW 2). The appellant testified that PW1, PW 2 and PW 6 were all liars. **DW 2 Joel Kimathi** testified that he was with the appellant from 3.00 pm until morning on 4th March, 2009 at Kiengoo where the appellant has a *miraa* shamba.

13. It is our considered view that the alibi raised by the appellant should be weighed against the dying declaration made by the deceased and the eye witness account of PW 5. In the present case, three witnesses PW1, PW 2 and PW6 testified as to the dying declaration made by the deceased. The credibility of the three witnesses was not shaken and the impression is that they were honest witnesses. Their evidence was consistent. PW 5 gave the name of the attacker and this is confirmed by the dying declaration of the deceased. PW 5 was able to see and testified that it was the appellant who was present at the scene and he was the one who was pushing the deceased. The testimony of PW 5 is one of recognition and the appellant was not a stranger to the deceased and to PW 5. We find that the evidence of recognition by PW 5 is water tight and places the appellant at the scene of crime and identifies him as the perpetrator of the offence. The dying declaration by the deceased corroborates PW 5's testimony. We are satisfied that the alibi raised by the appellant does not dislodge the eye witness account of PW 5 and the dying declaration made by the deceased.

13. One of the grounds of appeal is that the trial court erred in that no *mens rea* for murder was proved on the part of the appellant. On this submission, we cite the case of ***Daniel Muthee – v- R, CA No. 218 of 2005 (UR)***, where the Honourable Justices Bosire, O'Kubasu and Onyango Otieno JJ.A. while considering what constitutes malice aforethought observed as follows:

“When the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in a similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206 (b) of the Penal Code. In view of the foregoing, we are in no doubt that the appellant was convicted on very sound and watertight evidence as his guilt on the two counts of murder was proved beyond any shadow of doubt.”

14. We entirely adopt the statement by the learned Justices of Appeal made in the **Daniel Muthee** case. When the appellant cut the deceased on the forehead and abdomen, he must have known that the act of cutting would cause death or grievous harm. We have not found evidence of any intervening or extraneous factors to break the chain of events that led to the death of the deceased. We hold that through cutting, the appellant caused the death of the deceased.

16. The upshot of the foregoing is that we find that there was sufficient evidence of identification and recognition of the appellant as the perpetrator of the offence. We find that malice aforethought was proved. There is adequate evidence from PW 5 as an eye witnesses to the pushing and the dying declaration that the appellant cut the deceased. There is sufficient evidence to support the conviction and sentence of the appellant. We find that the prosecution proved its case beyond reasonable doubt. Accordingly, the appeal herein is dismissed.

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

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

.....

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