IN THE COURT OF APPEAL

AT KISUMU

(CORAM: GITHINJI, ONYANGO OTIENO, & KANTAI, JJ. A)

CRIMINAL APPEAL NO. 371 OF 2012

BETWEEN

ZABLON SHIKUNZI & 5 OTHERS ..... APPELLANTS

AND

REPUBLIC ….....RESPONDENT

(APPEAL FROM A JUDGMENT OF THE HIGH COURT OF KENYA AT

KAKAMEGA, (LENAOLA, J) DATED 13TH APRIL, 2011

IN

HCCRA NO. 7 OF 2005)

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JUDGEMENT OF THE COURT

In the information dated 7th December, 2005 the five appellant's Zablon Shikunzi, Joseph Indeche, Joshua Mboya, Pius Motoka Lumumba and Patrick Shikanga Likhotio (together with John Imbuka Olulu who died during the trial) were charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.

Particulars were that on the 26th March, 2005 at Luseru village, Buyahangu Sub-location, Kakamega District of Western Province with others before court they murdered Hillary Shikunzi.

A trial was conducted before the High Court of Kenya at Kakamega and in a judgement delivered on 13th April, 2010 Lenaola, J convicted all the appellants and sentenced them to death. Those findings provoked this appeal. Being a first appeal it is our duty to re-evaluate the evidence and come to our own conclusions always bearing in mind that we did not hear the witnesses or observe their demeanour as did the trial judge and thus give allowance for that – See, for instance, the holding of this court differently constituted in the case of **Josia Afuna Angulu v Republic (Nakuru Criminal Appeal No. 277 of 2006 (ur))**

The trial started before G. B. M. Kariuki J, (as he then was) who heard ten witnesses from the prosecution. The matter was then taken over by Fred A. Ochieng, J after the previous judge was

transferred. He took the evidence of one witness and was also transferred. Said Chitembwe, J took over but does not appear to have done much in the matter. It is Lenaola, J who took over from Said Chitembwe, J who handled the defence part of the trial and as stated convicted the appellants.

The case for the prosecution which was by eleven witnesses was that on 26th March, 2005 at about 9p.m. Isaiah Shikunzi (also called Shikunu in the proceedings) (PW2) was sitting on a chair next to a window in the kitchen of his house. In the room were his wife Joyce Mudeshi Luteya (PW3) their children Hilary Shikunzi, Lorene Shikunzi, Brigit Shikunzi, Hannington Teya Shikunzi and a helper Josephine Mukhwana (PW9). Lighting was provided by a tin lamp and a hurricane lamp. There was also moonlight through the door and two windows. PW2 had rested his head on the frame of the window which (window) was open. He was suddenly cut on the head by a person through the open window. He turned suddenly as he touched his head but another vicious attack took place where his right hand was cut and the ring finger was completely severed. PW2 moved away from the window and as he did so he saw two people – Zablon Shikunzi and Joshua Mboya who were at the window. Zablon was his blood brother and Joshua was a neighbour with whom he had grown. He tried to flee through the open door but was blocked by two people – Joseph Indeche who was his neighbour, and Pius Motoka whose home was about four kilometres away. So he ran to the second window of the kitchen but his escape was again blocked by two people who were his immediate neighbours, Patrick Shikanga and John Imbuka. Patrick and John were throwing missiles through this window and also flung containers which on landing would burst into flames. The kitchen caught fire and there was general melee and pandemonium as occupants tried to escape. PW2 fled through the door which had by then been vacated by its previous occupants and found his wife PW3 crying outside saying their child had been left in the burning kitchen. So PW2 had to brave the flames to rescue his son Hannington who he found engulfed in flames. He carried him to safety only to find his other son Hilary lying on the ground badly burnt. Neighbours had by then answered distress calls and PW2 and neighbours were able to get assistance from one Phabian Manya who drove the injured to Kakamega Police Station and thence to Kakamega Provincial General Hospital where PW2 and others were admitted. Hilary was admitted at Mukumu Hospital but his condition worsened and he was referred to Kisumu Provincial Hospital but died before arrival. PW2 was still undergoing treatment at the time of trial and testified that he could not wear shoes for over two months after the incident because the soles of his feet were burned.

The above narration was confirmed by PW3 and PW9.

Hesbon Shikunzi Alukungu (PW4) arrived home from work at about 8p.m on 26th March, 2005. He heard screams emanating from the compound of his neighbour PW2. He picked a torch which he did not use because there was moonlight and proceeded towards PW2s' compound. He presently heard voices of people coming from the direction where the screams were coming from. He recognized the voice of Joseph Indeche who he knew before from the neighbourhood. He decided to hide in the maize plantation next to the road and from his hide out recognized Zablon Shikunzi, who was carrying a panga, Joseph Indeche, Mboya Shikanga and another person Charles Shimechero. He knew all these people before because they were his neighbours. As they passed his hide out he heard them say in Luhya, a language he understood,words in the English language to the effect:

“...today we have overcome him....”

He then proceeded to PW2s' compound where he found the mayhem that had occurred. When he spoke to PW2 the latter informed him that he had been cut by Zablon and Joseph.

No. 46623 PC Paul Kiilu (PW5) attached to Criminal Investigations Department, Kakamega, visited the scene and took various photographs which he produced in court as exhibits.

Peter Shitabatsi Temba (PW6) was at home on 29th October, 2004 when he received a visitor, his neighbour Zablon (first appellant) who requested him to lead a delegation to the district administration to make representations because there were residents of the area who did not approve of PW2 being a Chief of the area. PW6 declined the invitation and was not persuaded even after the first appellant paid other visits.

Christopher Shedekho Sachita (PW7) attended a meeting called by the District Commissioner, Kakamega, on 29th October, 2004. This meeting was addressed by amongst others the first, second, third and fourth appellants. PW7 testified that the first, second, third and fourth appellants wanted PW2 removed as Chief of their area because he (PW2) came from a small clan called Musalwa. Peace was threatened and this witness, upon questioning the said appellants why they were acting as they did was told to wait to see what the appellants would do.

Christopher Mamba Ingotsi (PW8), a village elder, attended a meeting on 9th February, 2005 called by PW2 in his position as Chief of the area. The purpose of the meeting was to elect new village elders. PW2s' speech at this meeting was cut short by the third appellant who told those gathered not to listen to PW2 because he came from a small clan and was stupid. The second appellant also disrupted this meeting and both appellants threatened PW2 telling him **".....you will see..."**

No. 58732 PC John Koech (PW10) was the investigating officer who received a report of the incident and after carrying out investigations arrested and charged the appellants.

No. 47332 Snr Sgt. Benson Moiben (PW11) arrested the suspect who died during trial.

The death of Hilary Shikunzi was confirmed by Dr. Jason Amukonyi (PW1) of Kakamega Provincial General Hospital who conducted a post mortem on the body of the deceased on 29th March, 2005. Hilarys' body had changed colour and was severely burnt. Both lungs had collapsed and were filled with carbon monoxide. The Doctor found cause of death to be respiratory failure caused by burns.

That was the case for the prosecution which the appellants were called upon to answer.

The first appellant elected to give an unsworn statement where he confirmed knowing his co-accused and stated that some of his co-accused had differences with his family on matters of land and local leadership where his brother PW2 was unwanted as Chief because they came from a small clan. In that connection he had approached PW6 to intervene with the district administration but PW6 had refused to get involved. He therefore made a report at Kakamega Police Station but the police refused to book the report. On 26th March, 2005 he was to attend a fellowship at Sheywe Baptist Church but was confronted on the way by his co-accused who tied him up and stole his belongings. The whole party then moved to PW2s' home where an attack took place and he, the first appellant, managed to escape in the process. He later attempted to report the matter to Police but a report had already been made. He was later arrested and charged but denied the offence.

The second appellant Joseph Indeche in a sworn statement narrated how on 26th March, 2005 he plied the Kitale – Kakamega route as a matatu driver and retired home in the evening where he remained with his family and did not go out. He claimed to have been framed by PW2 because he had addressed a rally called by the District Commissioner where he had made a report against PW2 whose leadership as Chief of their area he found wanting. He also believed he had been framed by PW2 to thwart his political ambitions where he was to run for a local seat

John Ligale Aburili, a witness called for the second appellant stated that he had spent the evening of 26th March, 2005 at the house of the second appellant and the second appellant had not gone out. This was also the evidence of Damaris Sambula, also called in the same regard.

The third appellant Joshua Mboya gave sworn testimony where he stated that he had spent the evening of 26th March, 2005 at a local bar enjoying himself with friends including his witness Laban Milimo, who testified as such.

The fourth appellant Pius Lumumba Mutoka also gave sworn evidence where he stated that he spent the evening of 26th March, 2005 at home as he was tired. He received information of the attack at PW2s' home but did not visit.

The fifth appellant Patrick Shikanga Likhotio in a sworn statement narrated that he lived near PW2s' home and was home on the fateful night but did not hear any screams or commotion at all. He went to PW2s' home the following morning where he condoled with PW3 and assisted with funeral arrangements for the deceased. He was later summoned by PW2 who asked him to implicate the first appellant for the offence and was charged because he refused to do so.

Because the trial took place with the aid of assessors the learned judge summed-up the case for them as he was (then) required to do after which the assessors returned a guilty verdict against all the appellants.

The learned judge considered the case made out by the prosecution and the defence offered by each of the appellants and as stated above convicted them of the offence for which they were charged.

The first appellant, in the further Supplementary Memorandum of Appeal drawn by his counsel M/s Onyango Jamsumbah & Company Advocates raised five grounds of appeal to wit that the judge had erred in finding that the case for the prosecution had been proved beyond reasonable doubt; that the judge had erred by failing to consider the appellants defence; that the judge had erred by finding that circumstances for recognition or identification were favourable; that the judge erred by not complying with Section 200 of the Criminal Procedure Code and that the judge erred in convicting the appellant when important witnesses had not been called.

The second appellant took ten grounds in the Memorandum of Appeal drawn by M/s Bowry & Company Advocates . These ranged from a complaint that malice aforethought and motive were not established; that the evidence of the prosecution was uncorroborated circumstantial evidence; that the prosecution evidence was inconsistent and contradictory; that burden of proof was shifted contrary to law; that the second appellants' defence out weighed had the prosecution case; that the trial judge was biased in favour of the prosecution; that the judge erred in admitting hearsay evidence, that prosecution evidence was inconsistent and that the judge erred in summing up to the assessors.

Memorandum of Appeal for the third appellant was also drawn by M/s Bowry & Company Advocates in which the judgement was attacked because the judge should not have relied on suspicion against the third appellant; that the judge erred in holding that the appellant participated in the offence; that the judge erred in holding that there was a common purpose; that ingredients of murder were not proved; that prosecution evidence was circumstantial; that the prosecution did not prove what each appellant did in the commission of the offence; that the assessors were misdirected in the summing up; that the judgement did not contain the points for determination; that the judge erred in dismissing the third appellants defence and that the sentence for murder was wrong because the prosecution case did not make out a logical sensible and coherent story to prove the offence.

M/s Bowry and Company Advocates also drew Memorandum of Appeal for the fourth appellant where twelve grounds were taken. These ranged from the position that malice aforethought had not been established; that common intention had not been established; that the charge was not established beyond reasonable doubt; that the evidence tendered by the prosecution was insufficient to found a conviction; that the evidence tendered by the fourth appellant was ignored; that the judge erred in giving credence to the findings of assessors without giving reasons; that there was an unfair trial; that the judge ignored the government analyst report that ashes contained the smell of kerosene, not petrol; that the sentence of death for murder was unlawful and that the judge erred by considering the prosecutions' evidence collectively instead of separately for each accused person.

M/s Eric Ojuro Advocates drew Memorandum of Appeal for the fifth appellant in which seven grounds were taken. These ranged from complaint that the judge erred in failing to appreciate that the fifth appellant could not be identified; that the judge erred in failing to appreciate that the offence was committed at night, that the judge failed to analyse the evidence in totality; that the judge erred in failing to find that the offence of murder could not be established; that the appellants' defence was ignored; that the judge erred in relying on contradictory evidence and finally that the judgment was against the law and the evidence submitted.

The appeal came up for hearing before us on 11th November, 2013 when learned counsel appeared for the appellants as follows: Mr. Onyango Jamsumbah for the first appellant; Mr. Naeku T. T. for the second and third appellants; Miss Kamau C. W. for the fourth appellant and Mr. E. O. Ojuro for the fifth appellant. The State was represented by the learned Assistant Director of Public Prosecutions Mr. C. A. Abele.

Learned counsel for the first appellant submitted that the judgement was irregular for non-compliance with Sections 200, 201 and 210 Criminal Procedure Code in that trial was conducted by many judges but the appellants were not accorded opportunity to re-call witnesses and that there was no formal Ruling on whether there was a case to answer. Counsel submitted that conditions for identification were not favourable because the only source of light was a tin lamp. Counsel also submitted that failure to call some witnesses like the District Commissioner who had received report from PW2 including getting names of attackers should have been fatal to the prosecution case.

Counsel for the second and third appellants submitted that where a court convicts an accused person based on identification the evidence must be watertight. He cited the case of **R v Eria Sebwato [1960] EA 174** in support of this proposition and submitted that the trial judge did not consider the evidence of PW2, PW3 and PW4 with great care which evidence was of relatives. Counsel also attacked the evidence of PW4 on voice recognition which counsel submitted could not be relied upon because, according to counsel, the circumstances were very difficult. On malice aforethought counsel submitted that there was none and argued that the trial judge should have made a specific finding against each of the appellants on this issue. On alibi counsel submitted that this had not been displaced by the prosecution contrary to law. Counsel agreed with counsel for the first appellant that failure to call some witnesses prejudiced the accused persons and submitted further that common intention was not proved.

Counsel for the fourth appellant while associating with submissions by counsel for the second and third appellants submitted that common intention to commit the offence was not established by the prosecution. Counsel submitted further that conditions for positive identification were difficult because the only source of light was a tin lamp.

Like his colleagues counsel for the fifth appellant submitted that the source of lightning was insufficient and therefore evidence of identification was unreliable. Counsel submitted further that malice aforethought had not been proved because the deceased died much later in hospital while the target of the attack was PW2. Counsel believed that the fifth appellants' conduct was that of an innocent man because he attended the burial of the deceased and even hosted some of the mourners.

Mr. Abele supported conviction and sentence and disagreed with counsel for the first appellant on the submission that there was lack of compliance with Sections 200, 201 and 210 of the Criminal Procedure Code arguing that there was material compliance defect whereof was curable under Section 382 of the said Code.

On identification counsel submitted that conditions were favourable because there was a tin lamp, a hurricane lamp and there was moonlight which enabled PW2 and PW3 to recognize the attackers as the appellants. Counsel also referred to the corroborative evidence of PW4 who was said to have hidden in a maize plantation and overhead a conversation of the appellants and saw the appellants.

On malice aforethought counsel submitted that it was proved because there was intention to cause grievous harm through burning of the kitchen where PW2s' family was and transferred malice existed which led to the death of the deceased.

On common intention counsel submitted that all the appellants planned to kill PW2 whose leadership as area Chief they challenged because he came from a minority clan.

We have carefully considered the evidence presented before the learned judge, the Memorandum of Appeal, submissions of the learned counsel and the law.

It is true as we have observed in this judgement that the trial was conducted by four different judges.

Section 200 Criminal Procedure Code requires inter alia that in a trial that is taken over by a magistrate / judge who did not record earlier testimony the accused person may demand that any witness who had testified earlier be resummoned and reheard and a duty is imposed on the judicial officer to inform the accused person of this right.

As already seen the trial commenced before G. B. M. Kariuki, J (as he then was) on 5th May, 2005 who heard a total of ten witnesses. The judge proceeded on transfer and on 19th February, 2008 Fred Ochieng, J took it over. The record shows that Mr. Karuri appeared for the State while Mr. Aburili, counsel for the fourth accused appeared and also held brief for all the other counsel for the other accused. It is recorded that the counsel for the State requested that proceedings be typed so that the case could proceed from where it had reached and counsel for the accused persons accorded his agreement which process was duly endorsed by the judge. This was later confirmed by all counsel when the matter was called for hearing, on succeeding hearing dates. Justice Ochieng was then transferred and the trial came up on 2nd June 2009 before Justice Said Chitembwe. Counsel present are recorded to have stated:

"Mr. Elungata: Justice Ochieng only took the evidence of one witness, we are ready to have this matter heard before this court.

Mr. Aburili: the proceedings can be typed for the convenience of the court and the case can proceed before this court.

Mr. Karuri: I agree with my colleagues that proceedings to be typed and case proceed before this court.

S.J.CHITEMBWE, J

Court:- The proceedings to be typed. This case to be mention (sic) on 27/7/09

SAID J. CHITEMBWE, J."

Then Said Chitembwe, J was himself transferred and the matter was called before Lenaola, J on 30th November, 2009. The record shows that all counsel elected not to recall any witness.

It will therefore be seen that the appellants were represented by counsel all along during proceedings before the various judges. All counsel elected to have the trial proceed before every succeeding judge from where the previous judge had left off and none of the appellants either directly or through their counsel found it necessary to recall any of the witnesses who had testified at the trial. It must be presumed that counsel knew of the rights reserved by the provisions of Section 200 Criminal Procedure Code as read with Section 201 of the same code and the natural inference must be that none of the appellants through their counsel found it necessary to recall any witness. In any event and as pointed out by Mr. Abele, such a procedural breach, if breach it was, and we think there was none, was not prejudicial to the appellants and cannot vitiate the proceedings. We can see no merit in the submission of Mr. Jamsumbah that there was lack of compliance with the law.

Counsel for the first appellant also submitted that the learned judge failed to comply with provisions of Section 210 Criminal Procedure Code by not ruling on whether a case had been made for the accused persons to answer. With respect, this submission is untenable because a Ruling was delivered on 24th February, 2009 by Justice Fred Ochieng and is available in the file. In any case the proper provision is Section 306 Criminal Procedure Code and not 210 of that Code which is for subordinate courts.

All counsel for the appellants submitted that conditions for identification were difficult and urged that the appeal be allowed on that basis.

PW2 stated in evidence that in the kitchen there was a tin lamp as well as a hurricane lamp. He also said that there was moonlight. This is how he described the attack:

"... the window was open. When I was sitting in the kitchen after we had eaten, I was cut on the head by somebody through the window. I turned suddenly and looked through the window as I touched my head with my hand. As I did so, my hand was cut and I moved aside from the window. My right ring and little fingers were cut.

The ring fingers were cut. The ring finger was severed completely and the finger fell of. I see this picture.

<u>Mr. Karuri</u> – May it be marked

<u>Court:</u> Picture of severed finger marked Fi3 (c).

I saw through the window that there were two people. I recognized them. One was Zablon Shikunzi and Joshua Mboya. I see them in the dock. Court – 1st accused – identified in the dock.

Witness – The 1st accused is my real brother.

Accused No. 3, identified in the dock.

<u>Witness states:</u> the 3rd accused my neighbour and we grew together. I tried to flee through the door but there were two other people at the door. I saw them. I saw Joseph Indeche and Pius Motoka. I can see them in the dock

<u>Court:</u> Accused No. 2 and Accused No. 4 identified. Joseph Indeche is a village mate. Pius Motoka comes about 4 kilometers away from my home. I ran to the other end of the house where I found at one of the window was another. The two people were Patrick Shikanga and John Imbuka. I know them. They were my immediate neighbours. I see them in the dock."

And in cross examination he say:

".. It was moonlight. It was bright....

I saw the accused from the moonlight and also the light from the hurricane...."

In further cross examination PW2 states:

"...It was the 1st accused who cut my head. The 2nd accused threw the objects that lit the house. The 3rd accused also threw into the house the jerricans that lit the house.....

I was able to see immediately

I turned and looked through the window. At the small window I saw accused 6. He was not alone. They were two – throwing objects into the house...."

PW3 testified that she saw the first appellant cut her husband (PW2) with a panga. She knew him because he was a relative. She also recognized the other appellants who were neighbours and even gave names of other attackers who were not before the court.

Then there was evidence of PW4 who stated that he did not need to light his torch on the way to PW2s' home because there was moonlight. He heard voices one of which he recognized as that of the second appellant, his neighbour. He also recognized the first appellant who was carrying a panga and the third appellant and even gave the name of another person who was not before the court. He repeated the

conversations which he overhead being made by some of the appellants. He reported to police of his own volition and recorded a statement.

Mr. Naeku, the counsel for the second and third appellants relied on the Uganda case of **R v Eria Sebwato** (supra) where the accused was charged with robbery with violence and it was alleged that he and seven others broke into the house of the complainant who he knew before and stole money. It was alleged that violence was used. The accused denied the offence and set up an alibi. The prosecution evidence consisted only of the oral evidence of the complainant and his wife. There was also a statement by the complainants wife implicating the accused. There was discrepancy between the evidence of the complainant and his wife on the type and colour of clothes won by the accused during the robbery. The High Court in Uganda held that where the evidence alleged to implicate an accused person is entirely of identification that evidence must be entirely watertight to justify a conviction.

That is indeed a correct proposition of the law. It will be seen however that in the instant appeal the evidence of PW2 and PW3, although that of husband and wife is so well detailed that there can be no mistake on who the attackers were. The witnesses describe in detail the attackers who were well known to them and even described the role played by each of the appellants on the night of the attack.

Counsel for the second and third appellants also cited this courts decision in **Wamunga v Republic [1989] KLR 42**4 to fortify his submission that where the only evidence against an accused is evidence of identification or recognition the trial court must examine such evidence carefully and be satisfied that the circumstances of identification were favourable and free from possibility of error before safely making it the basis of conviction.

The evidence adduced by the prosecution on identification part of which we have reproduced in this judgement shows that there was sufficient light provided by the hurricane and tin lamps and moonlight outside which enabled PW2 to clearly see his attackers. He recognized his brother the first appellant who was at the open window with the third appellant, his neighbour. When he tried to flee his path was blocked at the door by his other neighbours the second and fourth appellants. He fled to the second window where he found the fifth appellant, again his neighbour, with the other accused who died during the trial. The attackers were also seen and recognized by PW3 who knew all of them before.

Immediately after the attack PW4 met some of the attackers who he recognized through voice and also clearly saw them because moonlight was so bright that he did not require to use the torch he was carrying. PW4 recognized the appellants and described that the first appellant was carrying a panga and also repeated the conversation he overheard from people he knew as neighbours. The evidence was that PW4 was a mere 5 metres from the road as he hid in the maize plantation.

There cannot have been any error in identification and the conditions were such that PW2, PW3 and PW4 clearly saw the appellants and recognized them. The first appellant is a brother to PW2 while the other appellants were close neigbhours.

Like the learned judge we are satisfied that the appellants were the people who viciously attacked PW2 setting the kitchen on fire which led to the death of the deceased.

The allegation that there was no common intention cannot have any basis. The appellants surrounded the kitchen where PW2 and his family were resting after dinner and carried out an attack that consisted of causing grievous harm on PW2, blocking the door to prevent escape of the occupants and setting the room on fire using an explosive substance that led to the burning to death of the deceased. Whether this substance was petrol or kerosene cannot be of any assistance to the appellants. The role played by each appellant in the whole unfortunate saga was explained by PW2 and we have repeated it in this judgement. The appellants intended to cause and did cause grievous harm leading to the deadly consequences in this case.

The appellants had planned their acts for a long time demonstrated by their speeches proved through the evidence of PW6, PW7 and PW8. The appellants held the view that PW2 was unfit for the job of Chief

of their area and they demonstrated their dislike through representations to the district administration. When PW2 was not removed as Chief they threatened him. The events of the fateful night were a culmination of what the appellants had planned all along.

On the failure by the prosecution to call some witnesses the simple answer is that there is no rule of law prescribing the number of witnesses to be called in proof of any facts. Unless the particular offence requires that – See Section 143 of the Evidence Act Chapter 80 Laws of Kenya.

The evidence of PW2, PW3 and PW4 established that the appellants were the perpetrators of the offence in the case. The appellants alibi defences were clearly ousted by the overwhelming evidence tendered by the prosecution.

The appeal by the appellants has no merit and it is accordingly dismissed.

Dated and Delivered at Kisumu this 20th day of December, 2013

E. GITHINJI

….....

JUDGE OF APPEAL

J. W. ONYANGO OTIENO

.....

JUDGE OF APPEAL

S. ole KANTAI

….....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR