



**IN THE COURT OF APPEAL  
AT NAKURU**

**(CORAM: OMOLO, GITHINJI & ONYANGO OTIENO, J.J.A.)**

**CRIMINAL APPEAL NO. 255 OF 2009**

**BETWEEN**

**1. COLLINS CHEPKWONY**

**2. DAVID KIPROTICH SIELE .....APPELLANTS**

**AND**

**REPUBLIC.....RESPONDENT**

(Appeal from a conviction and sentence of the High Court of Kenya at Kericho (Ang’awa, J.) dated 10<sup>th</sup> November, 2009

**in**

**H.C.CR.C. NO. 308 OF 2008)**

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**JUDGMENT OF THE COURT**

On a date he could not remember, at 7.00 p.m. *Kibet Torongei* (PW1) a salesman, then living in Kericho, went to Snow Bar. He was being entertained there by some guests. He was on the other side of that bar but on the outer side. It would appear that that bar has many drinking places, some of which were in the inner side. At about 9.00 p.m, the number of bar patrons had increased to close to sixty with some in the inner side. His guests left him in the bar. At that time, a fight broke out in the inner side of the bar. The fight continued to the outside part of the bar. When the fight started, everyone ran away and Torongei also rushed out. As they did so, those who were fighting continued to fight. According to Torongei, those who were fighting were two boys against two men. Torongei said in evidence that one group was overpowered by the other and of the two overpowered, one ran away while the remaining one succumbed to the assault and fell down. Torongei said he saw one of the two men who overpowered the other two use a “*jiko*” while the other was using a rubber weapon. As the overpowered man fell down, one of the assailants went back to the bar while the other was arrested by members of the public as he tried to escape. In the court Torongei identified the two appellants as some of the people involved in the fight, but he did not specifically state any part played by each appellant. He said first appellant was at the bar and second appellant was a watchman at the bar. In cross-examination, Torongei said Snow Bar was divided into inner, middle and highway verandah bar which had shades but was not where the fight

started. He saw the first appellant as he looked back while running away from the main building though he was scared. He ended his evidence by saying, the two men were handed over to the police but without specifying as to where the one who had escaped was found or when he returned to the scene. At 10.00 p.m. again on a day he could not remember, Fancy Chepkoech (PW3) was at work when he saw people outside at a distance he described in a cross-examination as far outside on the road. They were many people and he did not know what that gathering was all about as he did not bother to find out what was happening. APC Edwin Mabeya Ontita Ondita (PW5) and APC Ronald Gumo (PW9) were on patrol duties on 23<sup>rd</sup> July 2008 when between 8.00 – 9.00 p.m. they passed new Snow Bar. They saw many people and a person who had been injured lying down. On inquiry, they were informed that that person (now deceased) had been beaten by a certain person and a guard at the Snow Bar. They took the injured to the hospital, and re-arrested the appellants whom they took to police station. PC James Mwathe (PW6) investigated the case with a view to charging them with the offence of assault causing actual bodily harm but no witness was available so they were released on bail. The deceased Patrick Kipng'eno Korir was admitted at Kericho District Hospital. Charles Kipkemoi Korir (PW3) said that the deceased underwent a surgery to the stomach and he recovered but later he was taken back to the theatre and never recovered. Post mortem was later done on the body after Charles and his father Josephat Torongei (PW7) identified the body to Dr. Simba Brian Simba (PW8). Dr. Simba formed the opinion that the cause of death was septic shock secondary to peritonitis. After the death of the deceased, the matter was revisited and the two appellants were re-arrested and were, in an information dated 8<sup>th</sup> August 2008, arraigned in the superior court on the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code. The particulars of the offence were:-

***“On the 23<sup>rd</sup> day of July, 2008 at Snow Bar in Kericho town of Kericho District of the Rift Valley Province, jointly with others not before court murdered Patrick Kipng'eno Korir.”***

They each pleaded not guilty and in their defence each denied the offence in unsworn statement, in which each appellant denied being at the scene of the incident. After hearing prosecution's nine (9) witnesses and the appellants unsworn statements, the learned Judge of the superior court (Ang'awa J.) found the appellants guilty, convicted each of them and sentenced each to death.

The appellants were not satisfied with the conviction and sentence imposed upon them by the court and hence this appeal premised on identical grounds of appeal filed by each appellant. Those grounds are in a summary that; they were not positively identified as the perpetrators of the offences; that they were erroneously convicted on the basis of hearsay evidence; that the learned Judge convicted them despite numerous discrepancies and contradictions in the prosecution evidence; that the medical evidence did not connect the cause of death to the alleged assault by them and that the learned Judge failed to consider the defences advanced by them. Mr. Kirui, the learned counsel for both appellants ably addressed us at length on those grounds adding that the learned Judge based conviction on matters not given in evidence and pleaded with us to allow the appeal and set both appellants at liberty forthwith. Mr. Omutelema, the learned Senior Principal State Counsel, on the other hand, while conceding that the evidence on record proved the offence of manslaughter and not murder, nonetheless submitted that the appellants were properly identified as the participants in a fight that resulted in the deceased's death and thus the allegation that there was no proper identification of the appellants as the assailants of the deceased cannot be sustained both in law and in fact. He urged us to return a verdict of manslaughter and not murder.

We have anxiously considered the record, the submissions by both counsel and the law. The only evidence that may be said to relate to some extent to the identification of the people who were engaged in what was either a brawl or a fight between the deceased and another person on the one hand and other two people on the other hand, came from only one witness, namely Kibet Torongei. The other witness Fancy Chepkoech, who could, by extension, be said to have been at the scene, said he saw people gathered at a certain place which he did not state on a date he did not state and for a purpose he did not state. He was not, in our view of any use to the court at all. Other witnesses were the father and brother of the deceased who merely identified the body to the doctor for post mortem; the two doctors, Dr. Rono Sydney (PW2) whose evidence was apparently discarded by the court in preference to Dr. Simba's evidence, and the police witnesses who either collected the appellants, or investigated the cases.

The law is now well settled. A conviction can be based on the evidence of a single witness regarding identification. Indeed **section 143** of the Evidence Act states that no number of witnesses is required to prove a case or a matter unless the law specifically states so. However, as to a single witness on identification, before a court of law relies on his evidence to convict, the court needs to test with greatest care such evidence, particularly when the conditions under which such identification proceeded were not conducive to proper identification of a suspect. In the case of **Charles O. Maitanyi vs. Republic (1986) KLR 198**, this Court held that:-

***“Although it is trite law that a fact may be proved by the testimony of a single witness, this 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 a correct identification were difficult.”***

That legal proposition which earlier on was well spelt out in the case of **Abdalla Bin Wendo v. R. (1953) 20 EACA 166** was also followed in the case of **Marie & 3 others vs. Republic (1986) KLR 224**.

In this case Torongei was in the outer part of the bar. A fight broke out in the inner part of the bar. He did not know who started it and who were involved. Immediately people in the bar sensed that a fight was going on, they started running out of the bar. Torongei also started running out with his back towards the fight. There were close to sixty people in the bar and according to Torongei’s evidence those people were running out of the bar together with him. All this was happening at night although he says there was light. These were certainly not conditions favourable for positive identification of those who were fighting and continued to fight as they moved outside. Further, although the learned Judge stated in her judgment that Torongei said in evidence that:-

***“Collins Chepkwony, believed to be a patron at the bar was witnessed by PW1, one Kibet Torongei assaulting the deceased, Patrick Kipng’eno Korir and at one point using a “jiko” to hit him. The second accused David Kiprotich Siele used a rubber weapon to be a whip (a watchman)”***,

that is not reflected in the record at all. We have perused the record thoroughly and are unable to find any recorded evidence reflecting the learned Judge’s statement in her judgment. Torongei did not state what each appellant did. He did not in his evidence state which appellant was using a “jiko” and which one was using a rubber weapon. All he said was:-

***“I was in Snow Bar. I had guests to entertain me. When they left me I went. I was on the other side of the bar. Some men came from the inner bar. They were two boys and two men who were fighting together. The fight started from the inner bar then came out. The fight continued to the outer side of the bar. When they started fighting everyone got to his feet. As we rushed out, I being one of the first people, these people continued to fight. One was overpowered by two men the other escaped. The person was not able to handle the two men. I saw one of the men use a “jiko”. The other was holding a rubber weapon.***

***The man who was being beaten had nothing. He was overpowered beaten. Some of the wanainchi came. Then I saw the person overpowered lying down on seeing the boy was lying down having been beaten then one returned to the bar. The other was trying to escape. Members of the public arrested them. They were handed over to the police. I was not aware what the cause of the fight was. Prior, to the incident I used to see them. I identify accused No. 1 (sic) and accused No.2 sitted (sic) in the dock. The accused No. 1 was at bar, the accused No.2 was a watchman at Snow Bar.”***

In cross-examination he said:-

***“People began fighting in the inner bar. I was not there when the fight broke out they began to run. I got scared. The noises were first. On the material day. There were many people perhaps 30 many more even 60.***

***I was amongst people. I managed to get out of the main building that is when I looked back I saw the first accused hit. I saw them, they fought from the inner bar ran out I was scared.”***

Thus the conditions prevailing at the time of the incident, if we are to go by what Torongei stated in evidence are that he was in the main building but in the outer bar; a fight broke out in the inner bar; all the close to sixty bar patrons started running out; he also ran out as he was scared; he looked back and saw people fighting as the fight was moving outside; it was at night and he could only use the electric light. In our view, under those conditions, it cannot be safe to rely on the evidence of a single witness to establish identity of the people who were fighting. It is not surprising that Torongei could not assign to each appellant what the appellant did in furtherance of the fight and particularly what part of the deceased each appellant hit and with what weapon. We note further that the learned Judge did not warn herself of the need to exercise greatest care in relying on the evidence of a single witness on identification before she could enter a conviction. It is instructive that Mwathe who investigated the assault case arising from the same transaction found no witness to sustain the charge and released the appellants.

What we have said above, would have been enough to allow this appeal. However, we are also not certain that the post mortem report proved beyond reasonable doubt that the act of the appellants was the cause of the deceased’s death. Dr. Simba, who performed post mortem on the body of the deceased formed the opinion that death was due to septic shock secondary to peritonitis. He defined peritonitis as generally an infection. The deceased had earlier been operated upon and later returned to the hospital. No evidence was adduced as to the effect of that operation on the deceased. It was also not stated, as we have stated, as to what parts of the deceased’s body were hit by whoever assaulted him and thus no nexus was established between the assault and the cause of death of the deceased.

All the above were not considered by the learned Judge of the superior court. As this was a first appeal, it fell upon us to revisit the evidence afresh as is required of us, evaluate it and reach our own independent conclusion but always being aware that the trial court had the advantage of seeing and hearing witnesses and giving allowance for that – see ***Okeno vs. Republic (1972) EA 32.***

Having done that, we are of the view that this is a proper case for our intervention. We do so with the result that the appeals are allowed, the convictions quashed, and the sentences of death are set aside. The appellants are set at liberty forthwith unless otherwise lawfully held.

***Dated and delivered at Nakuru this 10<sup>th</sup> day of June, 2011.***

**R. S. C. OMOLO**

.....  
**JUDGE OF APPEAL**

**E. M. GITHINJI**

.....  
**JUDGE OF APPEAL**

**J. W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**