IN THE COURT OF APPEAL

AT NAIROBI

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

CRIMINAL APPEAL NO. 271 OF 2005

BETWEEN

JEREMIAH KIIRU NYAMBURA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from conviction and sentence of the High Court of Kenya at Nairobi (Rawal, J) dated 20th June, 2005

in

H.C.CR.C. NO. 24 OF 2003)
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JUDGMENT OF THE COURT

Following his conviction, after a trial, for the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code, **Jeremiah Kiiru Nyambura**, the appellant, was sentenced to death by the superior court (Rawal J.) sitting in Nairobi. He was aggrieved and hence this appeal, which is his first and last appeal.

In his memorandum of appeal and Supplementary Memorandum of appeal the appellant has raised basically four grounds, namely:

(1) The evidence on his identification as the murder suspect was not satisfactory.

(2) The trial Judge erred in law in holding that an alleged dying declaration by the deceased was believable and satisfactory.

(3) The trial Judge erred in rejecting the appellant's alibi defence.

(4) The appellant's constitutional right under section 72(3) of the old Constitution was violated.

This being a first appeal the appellant is entitled to expect that we will re-evaluate the evidence which was tendered before the trial court, draw our own conclusions from it, of course without overlooking the conclusions of the trial court, and bear in mind that unlike the trial court, we did not have the advantage of seeing and hearing witnesses testify as to appreciate their demeanour. We are also alive to the fact that in the case before us, the final decision will depend on credibility of witnesses in view of the fact that we

do not have any eye witnesses to the murder complained of.

The particulars of the charge against the appellant are as follows:

"On the 5th day of December, 2003 at Majengo Estate in Thika District within Central Province jointly with another person not before the court murdered SIMON KAMANDE NJOKI."

Although the appellant was arrested on 6th December, 2003, he was not taken to court for plea until 11th February, 2004. We find no explanation regarding the delay in the record before us. On that day no plea was taken as it was noted that the appellant was unrepresented and the superior court considered it essential that the appellant be assigned counsel to represent him, which was done and plea was taken on 25th February 2004. Mrs. Rashid represented the appellant at his trial. For some reason, however, she did not raise the issue of delay in presenting the appellant to court, nor did she require an explanation from the prosecution regarding the delay. We will revert to that issue later on in this judgment.

The facts giving rise to the charge against the appellant are short. On 5th December, 2003 at about 7 p.m. , Hosea Nganga Njoka (PW2), James Awandu Magolo (PW3), John Waweru Kariuki (PW4) and Stephen Mutuku Mutero (PW5), among others, all residents of Majengo Estate, Thika, were seated outside some premises having a conversation. **Simon Kamande Njoki** (the deceased) was also there. The deceased excused himself saying he wanted to go and see a brother in-law. He left and a short while later those he left behind heard screams coming from the direction to which he headed, calling them to go and help him, which they did. As they approached him, they saw two young men walking away fast. Those two young men were about 20 or so metres away. They saw the deceased bleeding from his chest and stomach. He was in pain and was bending forwards. They pursued the two young men. The street lights, and electricity light was brightly lighting the area. Using that light they were able to recognize the two young men as **Coco-Tea** (Kokoti) a nick name, and Junior also a nick name. PW2, PW3, PW4 and PW5 all testified that Coco-Tea was a nick name for this appellant, a person they knew well. PW3 testified that earlier on the same day he saw the two pass by where he was with the other people and he noted the clothes they had on. Besides he said, and on this he was supported by PW2, and PW5, the appellant turned during the time he and junior were being pursued, and the witness was able to see his face, even though momentarily. The appellant and his alleged companion escaped.

PW2 – PW5 arranged for the deceased to be taken to hospital. They hired a taxi, but the deceased was pronounced dead on arrival at the hospital. All the four witnesses testified that as the deceased was being taken to hospital he named Coco-tea and junior as the people who stabbed him with a knife. Police were notified and the names of Coco-tea and Junior were given to the police as the deceased's assailants. This was according to P.C. Daniel Mwendo, then attached to Thika Police Station.

The appellant was arrested on 6th December, 2003 from a beer joint. He was searched and a knife without a sheath was recovered tucked into his trouser at his waist. He was also allegedly found in possession of **cannabis sativa** (*bhang*) and some drugs. He was with other people. Junior, was not apparently there. He was later charged as earlier on stated.

In his defence, the appellant, in a statutory statement, stated that he used to be a dealer in fodder, and that on the material day he spent most of the day selling fodder. He left his place of work at 5 p.m., went to Majengo and later proceeded to Ngoingwa arriving there at about 7.35 p.m. He went home and slept. The next day he was arrested by people he did not know. Before arresting him they demanded of him to show them where Coco-tea and Junior were. It was after he denied he knew them that he was arrested. He was arrested with two others. He denied he was Coco-tea.

In her judgment Rawal J. accepted the testimony of PW2, PW3, PW4 and PW5, that the four witnesses recognized the appellant when they responded to the deceased's call for help. She also found as fact, that the deceased made a dying declaration and relying on the authority of **Choge v. Republic** [1985] held that the declaration coupled with the visual identification of the appellant by PW2, PW3 and PW5 left no doubt that the appellant was one of the two people who fatally wounded the deceased. She rejected the

appellant's alibi defence on the basis that the evidence of prosecution witnesses, in effect, displaced it.

In the appeal before us Mr. Obok O. Elvis,counsel for the appellant submitted on three main aspects, namely, that the rights of the appellant under **section 72(3)** of the former constitution were violated. That section provided that a person arrested for a criminal offence which carried a capital sentence, had to be taken to court within 14 days, which was not done here. Secondly, learned counsel submitted that the alleged offence against the appellant was committed at night time when conditions favouring a correct identification were difficult and lastly that the evidence did not clearly establish the existence of a dying declaration and also that the appellant was indeed the same as Coco-tea.

The main issues are twofold. First whether the circumstances under which PW2, PW3 and PW5 said they identified the appellant favoured a correct identification of the appellant. Secondly, whether indeed the deceased named his assailants just before he died. As stated earlier determination of this appeal depends on credibility of witnesses.

In convicting the appellant the trial Judge considered the circumstances under which the appellant was identified. The offence was committed at night time. However, PW2, PW3 & PW 5 testified that they knew the appellant before. He was popularly known as Coco-tea. Pw3 testified that he had seen him earlier the same day wearing the same clothes as those he was said to have had on at the time the deceased was fatally wounded. It is also noteworthy that at the time of his arrest, the appellant was found in possession of a knife which was tucked in his trouser at the waist line. PW2, PW3, PW4 and PW5 were all unanimous that there was ample light at the **locus in quo** and that facilitated the identification of the appellant. When the witnesses saw him walking away fast in the company of one Junior, he was barely 60 metres away. Considering the fact that the witnesses knew him well before, it cannot be said that their identification of him was mistaken. We remind ourselves of the caution this Court sounded in **Wamunga v. Republic** [1989] KLR 424, Kisumu Criminal appeal No. 20 of 1984 (unreported) concerning reliance on visual identification in criminal cases. The caution was that a person may be genuine in his identification of a suspect by way of recognition, but be mistaken, and hence the need for care before such evidence can be relied upon without other evidence, to sustain a conviction. We are, however, satisfied that the visual identification was without a mistake.

Besides, there is the additional evidence from the same witnesses that the deceased mentioned the name of the appellant whom he knew well before. Such evidence is admissible under **section 33(a)** of the Evidence Act. That provision does not impose any conditions as to the admissibility of the evidence. However, courts in this country have held that dying declarations must be tested before being admitted and acted upon in support of a criminal charge. (see **Choge v. Republic** [1985] KLR 1 . The reason for this is not difficult to understand. In certain cases a deceased person could be mistaken on the identity of his assailant if for instance his identification of him is under difficult circumstances.

In the case before us the assault of the deceased was at about 7 p.m. There was ample light in the area, and the deceased shouted calling for help. He named his attackers in the course of the attack. PW3 testified that some minutes earlier he had seen the appellant and Junior walking toward the **locus in quo** and before he heard the deceased calling for help. All that evidence placed the appellant at the scene of the offence. Besides, as stated earlier, the appellant was later on the next day, found in possession of a knife. The post mortem on the deceased revealed that a sharp instrument was used to inflict the fatal wound on the deceased. The totality of the circumstances coupled with the visual identification of the appellant leave no doubt that the appellant was one of the two men who inflicted a stab wound on the deceased leading to his death.

The aforesaid circumstances clearly displace the appellant's alibi defence which we, like the trial judge, reject.

With regard to the appellant's complaint that his constitutional right of being presented to the court promptly was violated, we say this, **prima facie** the right was violated. However, the issue was not raised at the earliest opportunity when an investigation could be carried out to ascertain the circumstances which led to the delay complained of. **Section 72(3)** of the former Constitution which was then in operation,

implies that the 14 days stipulated are not absolute. The prosecution may, in an appropriate case, offer an explanation which may absolve it from blame for the delay. The wording of the section, as material is:

"72(3). A person who is arrested or detained

(a) …
(b) …

and who is not released, shall be brought before a court as soon as is reasonably practicable…

… the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with."

Besides, a violation of the aforesaid section does not go to the guilt or innocence of the accused. It entitles the victim to certain remedies spelled out in the Constitution which remedies the appellant is at liberty to pursue, if he so wishes.

We have said enough to show that the appellant's appeal lacks merit. Accordingly it is hereby dismissed.

Dated and delivered at Nairobi this 1st day of July 2011.

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.M. GITHINJI
.....
JUDGE OF APPEAL

J.W. ONYANGO OTIENO
.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR