IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: TUNOI, O'KUBASU, & NYAMU, JJA

CRIMINAL APPEAL NO. 7 OF 2007

BETWEEN

PETER MUSYOKA HARUN.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Machakos (Wendoh, J) dated 15th March, 2007

in

H.C.CR.C. NO 20 OF 2003)

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JUDGMENT OF THE COURT

PETER MUSYOKA HARUN, the appellant, was tried by the High Court of Kenya at Machakos on an information charging him with the murder of a local shopkeeper named Alfonse Musembi Ndambuki, the deceased, on 8th May, 2002 at Kawethei Location, Kawethei sub-location, Mukunike village, in Machakos District within the Eastern Province. The appellant was convicted as charged and sentenced to death.

The facts which the learned trial Judge, Wendoh, J found proved may briefly be stated as follows. During the evening of the fateful day a group of villagers were passing time at Mukunike's shopping centre when at about 8.00 pm they heard loud screams emanating from the direction of the deceased's shop. Ronald Kiilu (PW1), his brother David Kiilu (PW2) and some other villagers ran towards that direction to find out what had happened. Outside the deceased's shop they saw the deceased screaming while clutching his stomach. The shop was open and there was a lit lantern on the counter. The deceased told the villagers who were assembled outside the shop, including the witnesses PW1, PW2 and Bernard Mwendwa (PW3) that he had been stabbed with a knife by the appellant who had tried to rob him. A nurse who lived within the shopping centre, Ann Ndeto (PW4), was called and she administered first aid on the deceased. She saw that the lower part of the deceased's abdomen had been stabbed and the intestines were protruding. Near the deceased was a bloodstained kitchen knife. As she gave first aid the

deceased was talking without any difficulty. PW4 asked him what had happened to him and the deceased told her that "Musyoka entered the shop and wanted some sweetex but he did not have it and he left." The deceased also told her that after that he (the deceased) continued to serve other customers and when he was ready to close, Musyoka entered and attacked him. He was firm that it was Musyoka who attacked him. Joseph Manguye (PW5) a local farmer who lived near the shopping centre told the trial court that:

"On 8/5/2002 at 8.00 p.m. I can recall. I was at my home. I heard screams and I went out. The screams were from the shopping centre. I live near there. I ran there. It was drizzling (raining a bit). I found Mutua and Muia and deceased Musembi who was laid on a form. I enquired what the problem was and Musembi said he was stabbed by Kititi. I asked who Kititi was and he said it was Musyoka Harun."

The postmortem report on the body of the deceased disclosed that the deceased had suffered a defence incised wound on the left middle finger; a longitudinal stab wound in the mid-abdomen 7 cm x 0.5 cm extending to and through the peritorium space with haematoma severing the lower part of the kidney. The cause of death was a stab wound to the abdomen inflicted by a sharp object.

The appellant in his defence denied killing the deceased. However, he admitted that he was at the shopping centre at the material time. He testified on oath as follows:

"On 8/5/02 when at home I was working outside our home from morning till 6.00p.m. I was with my mother. She is old and was sick. When I stopped working at 6.00p.m. I went to Kawethei market. I went to Dr Kisilu who sells medicines. I bought medicine for my mother. At about 7.00 p.m. on returning home I met PW 2 David Muia. We talked and he knew I was at Home. He is the one who could have known that I was at home. That is all I wish to state."

On the totality of that evidence, the learned Judge in convicting the appellant held that:-

> **"The deceased was consistent in his identification of his assailant. All the witnesses were informed that it is Musyoka Harun who assaulted the deceased, soon after the incident upto the time the deceased arrived in Kangundo Hospital. The accused was not a stranger to the deceased. PW1 and PW2 had seen him in the area that evening. In fact the accused does accept having seen PW2 on that evening. Though accused said that he never left the house after 7.15p.m. that night, PW1 testified that they passed via accused's house at about midnight after taking the deceased to hospital and it was locked from outside and had a padlock. The accused's alibi has not displace PW 1's testimony. There has been no explanation as to why the padlock was on the door if he was inside the house.**
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> **From the foregoing, this court is satisfied that the deceased did, not only identify, but recognised his assailant during the struggle with him and was able to recognize the accused."**

Aggrieved by those findings, the appellant comes before us and challenges the decision on two main grounds as contained in the supplementary memorandum of appeal. The two grounds are these:

1. **The superior Court Judge misdirected herself in ruling on the dying declaration which was not consistent and was doubtful.**

2. **The learned Judge erred both in law and in fact in arriving at the conclusion that the deceased must have identified the appellant.**

Our perusal of the evidence on record shows that the conviction of the appellant is grounded upon the deceased's dying declaration and his identification of the appellant.

It is plain that the killing of the deceased took place at about 8.00 p.m. when the deceased was alone in

his shop. A lantern was the only source of light. We, would thus agree with the learned Judge that in such circumstances the court needs to test evidence of identification with great care since conditions were not favourable to positive identification; and further that particular caution must be exercised when an attack takes place in darkness when identification of the assailant is, usually, more difficult than in daylight. See **R v Muyovya bin Msuma (1939) 6 EACA 128**. Thus, the main issue to consider is whether the deceased positively identified the appellant as his assailant.

On our careful scrutiny of the entire evidence on record we find that there were circumstances which go to show that the deceased could not have been mistaken in his identification of the appellant. First, the deceased and the appellant were from the same village and had known each other prior to the attack. Secondly, the deceased's shop was lit with a light from a lantern which was placed on the counter. Thirdly, the naming of the appellant to the four witnesses was immediate to the attack. Fourthly, the appellant confirms what the deceased had said that he, the appellant, had been to his shop looking for some medicine placing him at the scene of the killing at about 8.00 p.m.

On the issue of the dying declaration, it cannot be lost that the deceased told different persons (PW1, PW2, PW3, PW4 and PW5) that the appellant was the assailant. This is indeed evidence of the consistency of his belief that such was the case, but, though not a guarantee for accuracy. See **Choge v Republic, [1985] KLR 1.**

Arguing the appeal on the first ground, Mr. S.M. Njuguna for the appellant submitted that the dying declaration was not consistent and was doubtful. We do not agree.

All in all, it is our view that the learned trial Judge having carefully considered the dying declaration, the nature of its evidence and the caution with which it should be received, she cannot be faulted. It must follow therefore that the conviction based solely on it is safe and we uphold it.

In the result, this appeal fails and is accordingly dismissed.

Dated and delivered at Nairobi this 12th day of February 2010.

P.K. TUNOI

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

J.G. NYAMU

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR