REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT MOMBASA

Criminal Appeal 180 of 2008

OMAR HUSSEIN BAYA ……..……..…… APPELLANT

AND

REPUBLIC ……..…… RESPONDENT

(Appeal from the conviction and sentence of the High Court of Kenya

at Malindi (Ouko, J.) dated 5th June, 2006

in

H.C.CR.C. NO. 23 OF 2005)

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JUDGMENT OF THE COURT

In an information dated 26th October, 2005 and filed in the court on the same date, the appellant Omar Hussein Baya was arraigned in the superior court with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence were that:

"On the 1st day of October, 2005 at Watamu village within Malindi District of the Coast Province murdered Esther Syongu Malonza".

He pleaded not guilty to the charge but after full trial with the aid of assessors, the superior court (Ouko J.) found him guilty of the offence, convicted him and sentenced him to suffer death in accordance with the law. We add here that each assessor returned the opinion that the appellant was guilty of the offence of murder.

The deceased **Esther Syongu Malonza** was the daughter of **Sarah Muya Malonza** (PW1) of Mwingi. At the relevant time, she was living at Langata House, Watamu village. **Evelyn Etenasi Meja** (PW2), **Tabitha Jilani Munyoki** (PW3) and **Rosemary Kathure** (PW5) were all her neighbours as they were also living at Langata House, Watamu village. All these three women stated in their evidence at the trial that the appellant was living with the deceased and was her boyfriend. Tabitha said that on 1st October, 2005 the deceased returned home from work at 10.00 a.m. and went to bed. She woke up at 4.00 p.m. and both of them went to buy food. At 5.00 p.m. the deceased returned home, whereas Tabitha went elsewhere. Tabitha returned home at 7.30 p.m. and met the deceased outside their plot. Both of

them went into their plot with Tabitha going to take a bath in her house whereas the deceased went into her house, according to Tabitha. That evening Evelyn who sat outside her house in the same neighbourhood saw the appellant entering the deceased's house. While Tabitha was in the bathroom, she heard noises. The deceased was screaming. She came out of the bathroom and went to her house. When she got into her house, she found the appellant stabbing the deceased with a knife. The deceased was lying on Tabitha's bed as the appellant stabbed her. There was a lantern in the house and she said that source of light enabled her to see the appellant who had been known to her for four months. Tabitha went out of the house and raised alarm. Evelyn heard the screams from Tabitha. That was about two minutes after she had seen the appellant enter the deceased's house. She also started screaming but remained outside till other people responded to the screams. She went inside and saw the decease's body as by the time she went in the deceased had died. According to Evelyn, after Tabitha screamed, she went out. In cross examination, Evelyn stated that the appellant had entered somebody else's room – i.e. Tabitha's room, and it was two minutes after the appellant entered Tabitha's house that she heard screams from Tabitha. She also stated that the deceased and the appellant used to have fights occasionally prior to that date. Rosemary heard the deceased screaming and calling "*Tabitha I am dead"*. She came out in response but noting that Tabitha's house was in darkness, she retreated to her house, closed the door and only went out after many people had responded to the screams from the deceased and Tabitha. Tabitha said the appellant left the house as people were going there but before he left, he broke the lamp and thus the room was thereafter left in darkness with the deceased inside in a pool of blood. Tabitha said further that an assistant chief, who was not called as a witness reported the incident to the police. **PC. Johnson Thike** (PW7) of Watamu Police Station was on duty on that day 1st October, 2005. At 8.30 p.m., Sgt. Kola who was on duty at the station informed him of a report of murder case at Watamu village; he accompanied Sgt. Kola to the scene where they found a large crowd. The body was lying on a bed. There was also a blood-stained knife nearby. They tried to trace the appellant, but even with the help of the assistant chief of the area and one Pc. Saleh, they failed to trace him. Later they went to Timboni area, where they found the appellant in company of a vigilante group. They arrested him and took him to Watamu Police Station. The body of the deceased was also taken to Watamu Police Station and later escorted to Malindi District Hospital Mortuary. On 6th October, 2005, **Dr. Anold Obengo** (PW4) performed postmortem on the deceased in the presence of the deceased's mother **Sarah Muya Malonza** (PW1) and cousin **Nguli Musyoka** (PW6). The postmortem revealed five wounds on the chest – i.e. one near left side of the breast, one below the left breast, two on the right breast and one on the right hand side of the ribs. There was also a wound on the upper forearm, another on the right around the wrist, and one wound on each thigh. Those were external wounds. Internally there was a wound on the heart muscle and a wound in the liver. In his opinion, Dr. Obengo felt the cause of death was due to external and internal haemorrhage due to stab wounds particularly the wound that went into the heart muscles. Photographs of the scenes of crime taken by an unknown person but printed by Cpl. Kondo (PW8) were also produced in evidence. The appellant in his defence stated:

"**On 1.10.05 I was at home with my wife who woke me up at 4.00 p.m. to go and see her grand mother at Timbuni, I went and stayed up to 9.30 p.m. when I returned home I was arrested and taken to the police station. I was charged with this offence. I was surprised. I left my wife well and alive. I do not know how she met her death".**

The above facts are what the superior court, assisted by the assessors, analyzed, evaluated and found proper for a verdict of guilt against the appellant. In finding the appellant guilty of the offence as charged, the learned Judge of the superior court expressed himself, thus:

"**From the testimony of the two prosecution witnesses, Evelyn and Tabitha, I find that there is sufficient evidence of identification which displaces the accused person's alibi and places him at the scene of the crime. I am persuaded that the accused inflicted the injuries on the deceased using the knife that was produced in the case.**

The accused who had disagreed earlier on with the deceased returned that evening armed with a new knife. He repeatedly stabbed the deceased in the chest area and left her for dead. He clearly intended to cause her death and indeed did so. The deceased did not survive the attack. The accused person's alibi defence is rejected and I agree with unanimous opinion of the assessors that

he is guilty of murder.

I find the accused person of murder (sic), convict him accordingly and sentence him to suffer death in accordance with the law".

The appellant felt dissatisfied with that decision and hence this appeal.

The memorandum of appeal was filed by the appellant in person. It is composed of six grounds of appeal but Mr. Mabeya, the learned counsel who was assigned to the appellant and who took over the conduct of the appeal, while adopting the memorandum of appeal argued grounds 1, 3, 5 and 6 only. Those grounds state in a nutshell that the learned Judge of the superior court erred in convicting the appellant on the evidence of Tabitha notwithstanding that the circumstances prevailing at the time of the incident were not favourable as offence took place at night and the strength of the lamp, the only source of light, was not stated and the distance and position of the appellant to the lamp and to the witness were not stated together with the time the witness had the appellant under her observation; that the court should have rejected the evidence of Pc. Johnson as concerns the knife as the same knife was not subjected to examination to ascertain whether the blood stains on it was that of the deceased; that some witnesses, including the members of vigilante group who arrested him were not called as witnesses and that the learned Judge erred in law and fact by rejecting the appellant's alibi defence which created doubt in the prosecution case against the appellant.

Mr. Mabeya, addressed us at length on the above points emphasizing on the main, the discrepancies between the evidence of Evelyn and Tabitha as to time and the importance of the evidence as to which house the appellant allegedly entered immediately before the incident. He also submitted that the failure to submit blood-stained knife found at the scene of the incident for examination and failure to dust it for finger prints, were fatal to the entire case. Mr. Monda, the learned Senior State Counsel, on the other hand, supported the conviction stating that the evidence that was before the superior court was that of recognition and not that of identification of a stranger. That evidence was water-tight and rightly sustained a conviction. As to the alibi defence, Mr. Monda's view was that the learned Judge of the superior court considered alibi defence put forward by the appellant and rightly rejected it. On the failure to dust the knife for finger prints and subjecting the same to examination of the blood stains that were on it, Mr. Monda submitted that even if that was a flaw, the other evidence that was on record was enough and the appellant was properly convicted on it.

This is a first appeal. We are in law, duty-bound to revisit the case that was before the trial court afresh, analyze it, evaluate it and come to our own independent conclusion but always bearing in mind that the trial court had the advantage of seeing and hearing the witnesses and their demeanour and give allowance for that – see the case of **Okeno vs. Republic** [1972] EA 32. We have, with the above in mind, considered the entire record, the evidence that was before the trial court, the judgment of the learned Judge of the superior court, the submissions by the learned counsel before us, the grounds of appeal and the law. The main thrust of the appellant's appeal is on whether the appellant was properly identified as the perpetrator of the heinous offence despite his defence of alibi. To solve that problem, we have to consider the evidence of Evelyn and Tabitha. These were the only witnesses that alleged that they saw the appellant at or near the scene of the incident. The offence took place on 1st October, 2005. Evelyn said that she had known the appellant in April, 2005. By the time the offence was committed, she had known the appellant for a minimum of five months. Tabitha said by the time the deceased was killed, she had known the appellant for four months. Evelyn said the appellant was living in the same house with the deceased on the same plot with them. Tabitha was more specific. She said the appellant was deceased's boyfriend. We agree with Mr. Monda that considering the evidence of Evelyn and Tabitha, on the extent to which they knew the appellant, the inevitable conclusion is that the appellant was not a stranger to the two witnesses. This was a case of recognition as opposed to that of identification of a stranger. However, in law, even in cases of recognition, the Court is still enjoined to be extra careful in basing a conviction on the evidence of recognition because, even in respect of such evidence, the court has to accept that mistakes even of close relatives and friends, can be made. In the case of **R vs. Turnbull** [1976] All ER 549 at page 552 it was stated:

"**Recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made".**

However, in the case of **Anjononi vs. R** [1980] KLR 59, this Court stated:

"**This was however a case of recognition, not identification of assailants; recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger, because it depends upon personal knowledge of the assailant in some form or other".**

It is with the above in mind that we now proceed to consider the evidence that was adduced in this case and which was the basis of the appellant's conviction.

Tabitha did not see the appellant enter her house. She parted with the deceased when she went for a bath in a bathroom outside her house. As she was taking bath, she heard the deceased screaming. On coming out of the bathroom and going into her house, she found the appellant stabbing the deceased with a knife. The deceased was lying on Tabitha's bed which could only mean that she had gone to Tabitha's house when Tabitha was in the bathroom. There was a lantern which was still on and Tabitha was certain that the person she saw stabbing the deceased with a knife in her house was the appellant. She got inside her house and, as the lantern was in the house, we cannot on our own come to any conclusion but that Tabitha, who had known the appellant for the past four months by then, properly recognized the appellant as the person who was stabbing the deceased with a knife. As if that is not enough, the evidence of Tabitha is supported by that of Evelyn who also knew the appellant and who saw the appellant go to the room of Tabitha. Thus, whereas Tabitha did not witness the appellant entering her room as she was in the bathroom, Evelyn did see the appellant entering either deceased's room or Tabitha's room (we say either of the rooms because Evelyn said in her evidence in chief that she saw appellant enter deceased's house whereas in cross examination, she said appellant entered Tabitha's house). Whichever room he entered, the fact remains that when Tabitha heard screams from deceased and responded, she found the appellant stabbing the deceased. We would not put much emphasis on the identity of the room in which they were or the room into which he entered first because, there was no any evidence of any other person found in either of the two rooms or houses other than the appellant who was well known to Tabitha. Mr. Mabeya makes heavy whether of the time element and invited us to note that whereas Evelyn allegedly saw the appellant at 6.30 p.m., Tabitha puts the time she parted with the deceased at 7.30 p.m. and time of the incident at 7.45 p.m. None of the witnesses explained what caused them to observe the time those events happened. None says she had a watch and was timing these events. In the ordinary course of nature, these are not incidents that a witness can time with precision. The times they quoted must be treated as approximate times and as the times each conceived depending on the antecedents of each. On our part, we do not see the effect such minor discrepancies on clear evidence of the events that took place that day, namely, that the appellant who was well known to Evelyn and who was living with the deceased as her boyfriend was seen by Evelyn entering a house in a plot in which he was later found by Tabitha who also knew him, stabbing the deceased with a knife. That the deceased was killed by stabbing is confirmed by the evidence of Dr. Anold Obengo who put the cause of death as due to "*external and internal haemorrhage due to stab wounds*". Having on our own analysed the evidence of identification, and evaluated it, we find no tangible reasons to disturb the findings of the learned Judge of the superior court on that aspect.

The complaint that the appellant's defence of alibi was not given proper consideration is partly answered by what we have stated above. We have accepted that the appellant was properly recognized by Evelyn and Tabitha and was thus at the scene of the incident. That in effect means that, like the learned Judge did find, the evidence of the two witnesses clearly displaced the alibi defence. We note that the learned Judge indeed went the extra mile in dealing with the legal position when an accused person raises a defence of alibi and cited well known authorities on the legal principles on the defence of alibi. Mr. Mabeya however, felt that the sub-chief who helped in the arrest of the appellant and the deceased's grandmother he allegedly went to visit on the fateful day should have been called by the prosecution to throw some light on to the appellant's alibi defence. It is only in cases where the evidence adduced barely proves a case when the witnesses not called would be presumed by the court to have been

witnesses whose evidence would have been adverse to prosecutions – see **Bukenya and Others vs. Uganda** [1972] EA 549. In our view, the mere fact that towards the end of the trial, the appellant said that he had gone to Timboni to see his wife's grant-mother would not have been enough for the prosecution to seek to re-open their case to call the sub-chief of Timboni and his wife's grand-mother to ascertain if the appellant was indeed there if there was already enough evidence on record, as there was, to displace that allegation. Nothing turns on that ground of appeal and we reject it.

Lastly, Mr. Mabeya submitted that the blood stained knife found by PC Johnson should have been dusted for finger prints and examined to ascertain which blood was on the knife. We agree with him on that complaint. It is indeed unfortunate that the prosecution did not carry out proper investigation as far as that aspect is concerned. We indeed feel concerned that several of such cases are now the order of the day. We trust that this will change. Whereas we agree that in certain cases, such omission may be fatal, in this case, however, the fact that the blood stains on the knife were not shown to be that of the deceased and the fact that the failure to dust the knife for finger prints left a doubt as to who handled that knife prior to the incident, did not in our view weaken the prosecution's case. This is so because, the appellant was seen in the act and whether he used that knife or another knife is neither here nor there. He would thus still be the attacker on the basis that he was seen by Tabitha stabbing the deceased, which evidence of stabbing was confirmed by the evidence of postmortem carried out by Dr. Obengo.

In conclusion, having, on our own analyzed and evaluated the evidence on record, we find no proper ground to fault the learned Judge's judgment. It will stand. The appeal against conviction and sentence is dismissed.

Dated and delivered at Mombasa this 24th day of July, 2009.

R. S. C. OMOLO

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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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