



IN THE COURT OF APPEAL OF KENYA
AT NYERI

CRIMINAL APPEAL 229 OF 2005

JULIUS WAITITU MUTHUITA APPELLANT

AND

REPUBLIC RESPONDENT

**(Appeal from a conviction and sentence of the High Court of Kenya at Nyeri (Okwengu, J) dated
2nd August, 2005**

in

H.C. Cr. Case No. 26 of 2003)

JUDGMENT OF THE COURT

The appellant herein, **Julius Waititu Muthuita**, was charged with murder contrary to **section 203** as read with **section 204** of the Penal Code. The particulars of the offence were that on the 11th day of August, 2002 at Theri Village in Murang'a District of the Central Province, jointly with others not before court, the appellant murdered Mary Wambui Makumi.

The trial of the appellant commenced on 18th December, 2003 before Okwengu, J. The Prosecution called eleven witnesses. The facts of the case may be briefly stated. On the night of 11th August, 2002 at about 9.00 p.m. Jane Makumi (PW 1) was at her home in Theri village where she was living with her mother. As Jane had a baby who was disturbing her she suddenly saw the light of a torch. She alerted her mother who was sleeping in a different room. There was a loud bang and two men burst into Jane's room. These men were carrying powerful torches. Jane was pushed into her mother's room. One of the men told her mother that she should swallow (sic) the land which has been making her take them to court so that she could die with the land in her stomach. Jane recognized the voice to be that of her paternal uncle, the appellant herein. Jane went on to testify that she was able to see the appellant with the aid of the torchlight. She saw the appellant hit her mother (the deceased) with a fork jembe on her head. She heard the appellant tell the other people to start the job. She saw all these men attack the deceased but was unable to recognize any of them except the appellant.

The appellant then went to where Jane was and threatened to stab her with a knife. In an effort to protect herself, she lifted up her hands and the knife cut her on her right thumb. The appellant and his group then took some money and other items from the house and went away. After sometime, Jane ran out of the house to seek help from the neighbours, Peter Mwangi Mugo (PW 2), Bernard Wamugu Kamau

(PW 3) and Lee Gachina Gichuru (PW 4) who escorted her to the Chief's Camp. The incident was reported to the Chief and to the police after which police officers visited the scene where they found the body of the deceased. The body was taken away for postmortem examination. Jane mentioned the appellant to the police and as a result the appellant was arrested and charged.

When put to his defence, the appellant elected to make a sworn statement in which he denied involvement in the crime. He further testified that on the material night, he was asleep in his house with his family when he heard disturbance outside the house at about 1.00 a.m. He testified that he heard gunshots, footsteps and screams but he never went outside for fear of being attacked. The following morning, he joined people at the home of the deceased. He was later taken to Kahuro Police Station by the Assistant Chief. The appellant called his wife Mary Wangare as a witness. Mary Wangare confirmed that the appellant was, indeed, at home on this material night.

After submissions by Mr. Wambugu, the learned counsel for the appellant, and Mr. Orinda, for the State, the learned Judge summed up to the assessors who returned a finding of guilty on a charge of murder.

The learned Judge considered the evidence and the final submission and convicted the appellant of murder contrary to **section 203** as read with **section 204** of the Penal Code and sentenced him to death as mandatorily provided by the law. In convicting the appellant, the learned Judge in her judgment stated *inter alia*:-

“I find that the Accused was indeed identified by PW 1 both through voice recognition and visual recognition as one of the persons who attacked and fatally wounded the deceased. Given the comments made by the Accused during the attack and the fact that the deceased had a dispute with the Accused’s family over her late husband’s share of the family land, I find that the attack on the deceased was a premeditated action actuated by the land dispute. I therefore concur with the unanimous opinion of the Assessors and do find the Accused person guilty of the offence of murder contrary to section 203 as read with section 204 of the Penal Code.”

It is from that conviction and sentence that the appellant comes to this Court by way of first and final appeal. When the appeal came up for hearing on 1st August, 2006, the appellant's counsel, Mr. Wambugu Kaguithia, adopted the grounds filed by the appellant in person. Mr. Kaguithia's main ground of appeal related to identification of the appellant. He submitted that the offence took place at night when proper identification was difficult.

The second issue taken up by Mr. Kaguithia was that PW 1 never mentioned the appellant to the witnesses who came to the scene that night until a police officer arrived. As regards the evidence of identification by voice, Mr. Kaguithia submitted that there was a possibility of mistake.

Lastly, Mr. Kaguithia submitted that the appellant raised a defence of alibi which the learned Judge wrongly rejected.

Mr. Kaigai, the learned Senior State Counsel, in supporting both conviction and sentence of the appellant pointed out that the case against the appellant was based on the evidence of PW 1 who was the sole eye-witness. He submitted that her evidence was consistent, clear and cogent and that as the appellant was her uncle, she was able to recognize him and even his voice. It was Mr. Kaigai's submission that the defence of alibi was completely dislodged by the prosecution case. He therefore asked us to dismiss this appeal.

This being a first appeal, it is the duty of this Court to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld – see **Okeno v. R [1972] E.A 32.**

We have already given a brief summary of the evidence before the trial court. It has emerged that the appellant's conviction was based on the evidence of one witness, Jane Makumi (PW 1), who described

how a gang of people attacked her and her mother on the material night. She testified that she was able to recognize the appellant both physically and by voice. The issue before us is whether the identification of the appellant was proper in the circumstances of the case. The single identifying witness testified that there was light from the powerful torches that the appellant and his group were using. In dealing with the issue of identification, the learned trial Judge in her judgment stated: -

“P.W.1 was wide awake when the assailants arrived, given that the Accused was well known to her and having clearly heard the voice and what was being said, I find that she clearly recognized the voice and there was no possibility of a mistake. Moreover, P.W.1 was able shortly thereafter to recognize the Accused by face when the light of a torch from one of his other colleagues illuminated him. It is clear that this incident happened at night and that the conditions were not quite favourable for a visual identification particularly because P.W.1 was made to lie down. However P.W.1 explained that she kept on lifting her head and that the torches the men had were very powerful. The incident also took a considerable length of time P.W.1 estimating about 1 hour to the time she escaped. The Accused also did not exercise any caution in trying to hide or disguise his identity as he apparently kept talking and even confronted and beat up P.W.1. P.W.1 therefore saw the Accused well and was able to describe how he was dressed.”

The foregoing clearly shows that the learned trial Judge was alive to the fact that he was dealing with the evidence of identification at night by a single witness.

In **Roria v. R [1967] E.A 583 at p. 584** Sir Clement de Lestang V-P said: -

“A conviction resting entirely on identity invariably causes a degree of uneasiness and as Lord Gardner, LC said recently in the House of Lords in the cause of a debate on section 4 of the Criminal Appeal Act 1966 of the United Kingdom which is designed to widen the power of the court to interfere with verdicts;

“There may be a case in which identity is in question, and if any innocent people are convicted today I should think that in nine cases out of ten – if there are as many as ten – it is in question of identity.””

The above has been quoted with approval in many decisions of this Court including **Abwao & Another v. R [2003] KLR 209 at p 211.**

We have carefully considered the evidence of Jane Makumi (PW 1) and having re-evaluated the same, come to the conclusion that although this was evidence of identification at night by a single witness, her evidence was consistent, clear and cogent and that there was light from the powerful torches that the assailants were using. Moreover this was evidence of recognition since the witness (PW 1) knew the appellant very well. In **Anjononi and others v. R [1980] KLR 54 at p. 60** this Court stated *inter alia*: -

“Being night time the conditions for identification of the robbers in this case were not favourable. 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 the personal knowledge of the assailant in some form or other.”

The above applies to the present appeal where the appellant was recognized by a witness who was a relative. There was yet further evidence of recognition by voice. The learned trial Judge considered the evidence of recognition by voice and in her judgment stated: -

“I have carefully considered the evidence of PW 1. She testified that she heard and recognized the voice of Accused as she knew him well, the Accused being her paternal uncle. She testified that the Accused spoke in Kiswahili language, which she clearly heard and understood what the Accused said which was to the effect that the deceased should swallow the land which has been making her take them to court, and die with the land in her stomach.”

From the foregoing, the learned trial Judge accepted the evidence of recognition by voice. The appellant was an uncle to the witness (PW 1) who testified that she knew her uncle's voice. In **Mbelle v. R [1984] KLR p. 626** this Court laid down guidelines as regards the evidence of voice recognition as follows: -

"In dealing with evidence of identification by voice the court should ensure that –

- (a) The voice was that of the Accused.**
- (b) The witness was familiar with the voice and recognized it.**
- (c) The conditions obtaining at the time it was made were such that there was no mistake in testifying to what was said and who had said it."**

In this appeal, the witness was emphatic that she heard the appellant speak as he ordered the others to start the job that had taken them there. She was familiar with the appellant's voice as the appellant was her uncle. The conditions obtaining were such that there could be no possibility of error. We are satisfied that the evidence of identification by voice was reliable.

As regards the appellant's defence of alibi, this was considered and rightly rejected. In rejecting the defence of alibi the learned trial Judge stated as follows in her judgment: -

"I have weighed the alibi of the Accused against the evidence adduced by the prosecution but find it rather difficult to believe that Accused and his wife could have ignored or slept through the commotion including the shooting of APC Haniel Njoka which was happening just about 60 metres away from his house. Although the prosecution did not make any effort to interview members of the Accused's family with a view into inquiring into his alibi, they had sufficient evidence showing that the Accused was at the scene of the murder at the time the deceased was attacked. I therefore reject the alibi defence of the Accused as untrue."

We are in entire agreement with the observation of the trial Judge.

We were asked to consider the fact that there was a dispute over land. Indeed, it is our view that this unfortunate incident was as a result of a family land dispute. The motive of this attack on the defenceless woman (the deceased) was a grudge over land. That is why the appellant and his group viciously descended on the home of the deceased and mercilessly hacked her to death. As correctly pointed out by Mr. Kaigai, this was nothing but murder.

For the foregoing reasons, we are satisfied that the appellant was convicted on very clear and cogent evidence of recognition. We find no merit in this appeal. We order that this appeal be and is hereby dismissed in its entirety.

Dated and delivered at Nyeri this 4th day of August, 2006.

E.O. O'KUBASU

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JUDGE OF APPEAL

E.M. GITHINJI

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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