



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI**

CRIMINAL APPEAL NO. 98 OF 1992

BETWEEN

**TOM PIEMO
OMBURA**
**..... 1ST
APPELLANT**

**SHIKUDHANI
ATWANG
RUMAYWA**
**..... 2ND
APPELLANT**

AND

REPUBLIC
.....
..... RESPONDENT

(Appeal from the Judgment and conviction of the High Court of Kenya at Nairobi (Mr. Justice Mango) dated 22nd October, 1992

in

H.C. CRIMINAL CASE NO. 44 OF 1991)

JUDGMENT OF THE COURT

At the commencement of hearing of this appeal, counsel for the appellant, Mr. Kiage, spent a considerable amount of time arguing ground one of the appellants' grounds of appeal which was in the following terms:

"That the learned Judge erred in law and misdirected himself in proceeding to try and convict the appellants on a charge of murder when the record shows an offered and accepted plea of manslaughter".

Upon checking the original record of the superior court it transpired that the record of appeal was not accurately typed as included in the former record was a typed "plea sheet" with provisions for the trial Judge to enter plea of murder or manslaughter. Hence the confusion that had arisen. Consequently, nothing turned on this ground.

The appellants herein, Tom Piemo Ombura and Shikudhani Atwang Rumaywa, were charged and

convicted of murder contrary to **section 204 of the Penal Code**. The particulars of the Charge against them were that on 15th of November, 1990 at Njiru village in Embakasi within Nairobi area they jointly murdered one Loiyangomoy Lothirima Alila. They were each convicted and sentenced to suffer death in the manner authorized by law. It is from this conviction and sentence they Tnhoew afpapcetasl tboe ftohries tChoeru rtl.earned trial Judge were fairly straightforward. The deceased, Loiyangomoy Lothirima Alila, and his friend, James Ichoko (**PW 1**), lived at a place called Makongeni, in Njiru within the Nairobi area. On 15th November, 1999 at about 7.00 p.m, the deceased went to Ichoko's house and the two set off to what turned out to be a drinking spree. Ichoko did not remember the first bar they went to and drunk till about 9.00 p.m. The two then left that bar, went past their house into Marigoini Bar where they met Gachoka (**PW 3**). They each had three bottles of beer. They left this bar at about 11.00 p.m. After a short distance they parted and Gachoka went his way while the two continued going to their respective houses. A short distance from their houses, three people appeared ahead of them. They ordered them to stop and asked them where they were coming from and where they were going to.

They answered that they were going home. All over sudden one of the people hit Ichoko and he fell against the wall of some house. The other two people began beating the deceased. As Ichoko laid down he was afraid and felt dizzy. Upon feeling better he heard the assailants speaking in Luo Language, (which he did not understand). The assailants ran away as people came to their rescue. The deceased at this point told him that he had been stabbed on the head. Ichoko left the deceased at the scene and went to seek for help. Gachoka was amongst the neighbours and other people that came to thAec csocrednien.g to Gachoka, he first encountered the deceased and Ichoko at Karundali Bar at about 9.30 p.m. He knew them and they drank together till 11.00 p.m. They left together but after parting from them at a distance of 100 metres he heard screams from behind. He turned to go and find out what was happening. Before reaching the scene he met a person running in the direction they had come from. As he approached the scene he found the deceased injured, bleeding profusely and lying on the ground. He asked Ichoko what had happened and at that stage another person bolted off and ran to the opposite direction. He left Ichoko looking after the deceased while he went to report to Njiru Police Post. On the way he met two police officers, P.C Michael Nyongesa (**PW 5**) and P.C Erasmus Njeru (**PW 6**). These two rushed to the scene while Gachoka proceeded to the Police Post to make a report.

At the scene the two police officers met Ichoko. The deceased had by then passed away before the vehicle to take him to the hospital had arrived. Ichoko told P.C Nyongesa and P.C Njeru that he knew the people that had attacked them. He led them to the house of the 1st appellant. The 1st appellant was at the house and was arrested. Ichoko identified a pair of trousers and a shirt, as clothes that the 1st appellant was wearing. The same were taken by the police officers.

Upon further information, on the same night at about 5.30 a.m, the 2nd appellant was arrested and together with the 1st appellant the two were taken to Embakasi Police Station.

The Post Mortem performed on the deceased's body by Dr. Samuel Odera Ywaya (PW 2) on 29th November, 1990 revealed that there was a deep wound on the left side of the stomach measuring 4cm by 2cm by 6cm. The cause of death was "massive bleeding from the abdomen due to a ruptured spleen consistent with sharp object"

Statements were taken by I/P Martha Muthoni (PW 10) from both appellants ten days after their arrest. The 1st appellant denied killing the deceased or even knowing him. Similarly, the 2nd appellant also denied knowing the deceased, killing him nor did he know who killed him.

However, in their trial, the appellants gave in sworn testimonies. The 1st appellant stated that at the time of his arrest, Ichoko was forced by the police to say that he (1st appellant) was one of the attackers and that the clothes he was wearing were in the house. Otherwise Ichoko had said that he did not know their assailants.

As to the 2nd appellant, Rumaywa, he testified that on that night he went drinking at Maribu-Inn Bar. He stayed and drunk with his friends until 9.00 p.m when he left with the 1st appellant who was his neighbour. The 1st appellant asked him to escort him and check on his girlfriend at Winam Bar. They did

not find the girlfriend neither at the Bar nor at her house. On their way back, he heard people who were drunk making noise. The 1st appellant asked them where they were coming from and where they were going to. These people started exchanging insults with the 1st appellant. A fight broke out between the 1st appellant and those people.

The appellants' principal grounds of appeal were:-

"2. That the learned Judge erred in failing to find that the alleged recognition or identification of the appellants was not free from the possibility of error." and

3. That the learned Judge fell into grave error in basing his conviction on the suspect testimony of a single witness."

On issue of identification and/or recognition, the learned Judge was sensitive to the fact that Ichoko was the only eye witness. It was his sole evidence that he recognised the appellants that connected them with the murder of the deceased.

The law is well settled in as far as the identification or recognition of an assailant by a single witness is concerned. In *Abdalla Bin Wendo V R* [1953] 20 EACA 166 this Court said that (subject to certain exceptions) a fact is capable of proof by the testimony of a single witness but this did not, however, lessen the need for testing with the greatest care the evidence of such a witness in respect of the identification especially when it is known that the conditions favouring the identification are difficult. In such circumstances, other evidence, circumstantial or direct pointing to the guilt of the appellant is needed.

Thirteen years after *Abdalla Bin Wendo*, the Court in *Roria V R* [1967] EA 583, once more stated that, there was indeed a danger in basing a conviction solely on the identification of a single witness and this Court had a duty in a case where this has been done, to satisfy itself that in all the circumstances the conviction was safe.

In *Kamau V the Republic* [1975] EA 139, this Court once more stated that whether or not a conviction could be supported when based on the evidence of a single witness was a question of mixed fact and law where the circumstances were such that identification was difficult. As to the difference between identification and recognition, this Court in *Anjononi and Others V The Republic* [1980] KLR 59 stated as follows:

"This was however a case of recognition not identification of the 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 evidence before the learned judge was that Ichoko knew the assailants, they came from the same village. The judge was satisfied that Ichoko saw the assailants clearly because there was moonlight. Further that Ichoko told the police he knew two of the assailants and immediately took the police to their houses very close to the scene.

Ichoko had no idea what his assailants' names were. He did not disclose how long he had known them, where they worked or what they did for a living or for that matter when he last saw them. The only stated factor by which he knew them were their houses. Nowhere in his evidence did he refer to any other encounter with the appellants that would have made him see them by moonlight and be able to recognise them as people he knew. He admitted that he was afraid and in fact became dizzy when he was hit by one of the assailants.

Considering that Ichoko and the deceased had been on the hop from one bar to another drinking for a period of four to five hours we are doubtful that he was in a state to clearly see his assailants by moonlight for the brief period that the attack took place and be able to identify or recognise them positively, with no possibility of him making a mistake. There was room for a mistaken recognition. The circumstances under which he allegedly recognised the appellants were far from being favourable. We

agree with Mr. Kiage that the learned Judge erred by convicting the appellants upon the identification evidence of Ichoko which may not have been free from error. Consequently, the case against the appellants was not proved beyond reasonable doubt. We therefore allow the appellants' appeal, quash their conviction and set aside their respective death sentence and order that they be set at liberty forthwith unless held in custody for any other lawful cause.

Dated and delivered at Nairobi this 14th day of July, 2000.

J.E GICHERU

.....

JUDGE OF APPEAL

A.M AKIWUMI

.....

JUDGE OF APPEAL

E. OWUOR

.....

JUDGE OF APPEAL

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