IN THE COURT OF APPEAL

AT NAIROBI

(Coram:Nyarangi, Platt & Apaloo JJA)

CRIMINAL APPEAL NO. 159 OF 1984

BETWEEN

1. ALEXANDER NYACHIRO MARUBE

2. PETER MUSABA MARUBE...APPELLANTS

AND

REPUBLIC..RESPONDENT

(Appeal from the High Court at Kisumu, Schofield J)

JUDGMENT

The two appellants Alexander Nyachiro Marube and Peter Musaba Marube and another were charged with murder contrary to section 204 as read with section 203 of the Penal Code. At their trial, when they pleaded not guilty to that charge, the Judge, after a trial, convicted the appellants of the offence charged. The other accused was acquitted and discharged.

The Judge's decision is challenged by Mr Osoro on behalf of both appellants and the grounds which counsel for the appellants put before us in support of the appeal are that:

1. The learned Judge misdirected himself in law and fact in his finding that the appellants were properly identified when the circumstances warranting identification were grossly unfavourable.

2. The learned Judge misdirected himself in law and fact on relying on the purported identification by voice when it was unsafe to do so in the circumstances.

3. The learned Judge misdirected himself in law and fact in convicting the appellants on the evidence which he treated as suspect and having a possibility of concoction.

4. The learned Judge erred and misdirected himself in law and fact in believing and relying on what PW 1, PW 2 and PW 3 told other witnesses as evidence of the appellants' participation.

5. The learned Judge erred and misdirected himself in law and fact in failing to resolve the material contradictions and discrepancies in the main prosecution witnesses in favour of the appellants.

6. The learned Judge erred and misapprehended the evidence of PW 1 Abigail Ondari whose evidence he accepted without testing the same with the totality of the evidence of other witnesses.

7. The learned Judge erred in that having discounted the testimonies of PW 2 Josephine Ondari and PW 3 Henry Ondari he failed to approach the case as one of identification of a single witness in an unfavourable circumstances and resolve this difficulty in favour of the appellants.

8. The learned Judge misdirected himself in not considering the improbability of PW 1's evidence as against the allegations about PW 4 as being one of the gang, vis-à-vis the testimony of PW 3 Henry Ondari.

9. The learned Judge erred in holding that the testimonies of Henry, Ogega and Simon Marube proved beyond reasonable doubt that appellant No 1 was in the general vicinity of the scene of the murder.

10.The learned Judge erred in drawing unfavourable inferences from the fact of the appellant No 1 was not having given evidence on oath.

The first issue of law raised by Mr Osoro, counsel for the appellants, was identification, a matter which was dealt with by Abigail (PW 1), Josephine (PW 2) and Henry (PW 3) the three children of the deceased.

Mr Osoro pointed out that Josephine was aged 14 at the material time and that her testimony was discredited by inconsistencies in the statements she made to police officers. As an instance of the August 4, 1982 wherein she stated she did not observe the appearances of the persons who attacked them. However on September 8, 1982, Josephine said that the second appellant Peter Musaba Marube took their lamp and lit it after a group of eight people forcibly entered their house and that the other appellant was in the gang. Mr Osoro submitted that the trial Judge should have held that Josephine was not a credible witness.

As regards Henry (PW 3) Mr Osoro argued that this witness escaped from inside his hut at night and in circumstances which were adequate for recognition of voices and that the report of the witness to Onyando (PW 5) and to Maranga (PW 1) was that, he, Henry, had escaped from his house leaving thieves breaking into the house. Henry did not mention any names. Mr Osoro also referred to Henry's evidence that while he was walking to the home of the chief of the area to report the incident he met the second appellant walking in the opposite direction, that the appellants chased him and ordered him to stop as they chased him and that he was able to see them with the aid of moonlight. Mr Osoro argued that on Henry's evidence including what he said to Nyambane (PW 10) that he did not know who had kidnapped his mother and sisters, it was not a clear moonlit night and therefore that the evidence of Henry on the question of identification is unsafe. The other major point raised is as to the evidence given by Abigail (PW 1). The prosecution and the Judge attached great importance to that evidence. The legal question raised in the argument is that had PW 1's evidence been considered against the testimony of Nyambane (PW 10) which testimony was *inter alia* that he was awakened by Henry, then walked some 200 metres to the river, there found the dead body of the deceased and Abigail who was bleeding but who made no report about the attack on her deceased mother and on herself - that if Nyambane's evidence had been borne in mind in the consideration of Abigail's evidence, the Judge may reasonably have doubted the veracity of the evidence of Abigail.

Mr Murgor for the respondent Republic took, understandably, a different line. In answer to Mr Osoro's contention that the evidence of Abigail left much to be desired, Mr Murgor argued that Abigail recognized the voices of the appellants, that there was sufficient light in the house, that the appellants and four others were inside the house for more than thirty minutes and therefore that Abigail had an opportunity to see the appellants.

Mr Murgor conceded that Josephine was of tender years at the material time, and that there were discrepancies in her evidence. Learned state counsel however sought to persuade this court that on a true view of the facts, the discrepancies in Josephine's evidence are minor, that this young girl who knew the appellants before did see them in the house and that her narration of the unfortunate incident is similar to that of Abigail and Henry. As for the evidence of Henry, Mr Murgor's submission was that this witness recognized the voices of the appellants who are his paternal uncles and that that was possible even if it is held that the circumstances were not favourable for visual identification.

The primary facts which lie behind the allegations made against the appellants will emerge in the course of our consideration of Abigail's evidence. We would at the outset state that we find ourselves in respectable agreement with Mr Osoro that the evidence of Josephine and Henry in as much as it related to identification, which is the principle issue in the case, was unsatisfactory. Josephine offered two different versions of what she saw. Her statement to police officers was so inconsistent with her evidence in court that she just could not be regarded as a credible witness whose evidence could be believed and used to corroborate other evidence. The Judge took the position that Henry met the second appellant in the general vicinity of the deceased's house. The conditions for identification of any sort were, however, so unfavourable that Henry could not see or hear the voice of the persons he saw at a distance walking away. The Judge fell into error in holding that these two witnesses positively identified the appellants. We will disregard the evidence of the two witnesses because a sufficient legal reason has been advanced against the conclusion of the Judge. We must therefore look only to the testimony of Abigail, and that alone, on the key issue of identification. In so doing we are all not entering new territory here. On the contrary this is a legitimate approach. We would like to echo the following words of the judgment in *Abdallah bin Wendo and Another v R*, (1953) 20 EACA 166 at page 167, "subject to certain well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the condition favouring a correct identification were difficult."

*I*n our analysis of the evidence of Abigail as a first appellate court we will be guided by the decision in *Pandya v R* [1957] EA 336 *Mark Kariuki v R* Criminal Appeal No 62 of 1985 and *Robert Muthee Mwangi & another v R* Criminal Appeal No 121 of 1984. We will now evaluate Abigail's evidence and reach our own conclusions while weighing what the Judge thought of her.

Recalling the fateful night, Abigail who was then aged 20 years and an "A" level student testified that earlier during the day at about 3 pm she saw the second appellant, her uncle, whom she knew since she was born and whose house is about half-a-mile away and is adjacent to the deceased's house. She read until 10.00 pm and went to bed. About one hour later she was awakened by people who told her deceased mother to open. The people broke the main door and entered the living room and then all six men, each carrying a torch but only three of them flashing their torches, entered the bedroom whereupon the second appellant lit the lamp which was on the chair. The torches were switched off but the lamp was not extinguished. Abigail and her deceased mother and Josephine were thereupon ordered to sit on the floor. Just before they were told to keep quiet, the people slapped them using swords. The second appellant gave Abigail and others a lecture while his co-thugs made comments. To pause here, at that stage, Abigail was looking at the people and listening. She had not been injured yet. Nor was she

directed to look elsewhere. That was followed by demands for money and more slapping. On being commanded to get up, Abigail and the others were led to the living room. The lamp was lifted and carried to the living room. There was light and silence.

Abigail and the others were tied up together. The two appellants and another tied them up using a piece of rope which the second appellant picked outside the house. We pause yet again, to observe that Abigail and the others would not have been tied up without light. The second appellant must have picked the piece of rope from outside the house by the use of light.

Abigail was asked for the key to her box and at her suggestion the first appellant took the key, opened her box, took out her big handbag, her clothes, and her bed sheets, and a thermos flask. All that time Abigail and her deceased mother and sister were tied together. Abigail was watching what was happening to her property. She pointed out where the key to her box was and the key was found and used. There must have been adequate light for all that exercise to be started and completed. Thereafter Abigail and her relations were taken outside the house. Abigail says this of what she saw,

"outside we found more than seven people. The lamp was still on".

The lamp must still have been on for Abigail and others to be led out of the house and Abigail could not have noticed that there were more than seven people if there was no light.

Then followed the forced journey, in darkness, the lamp having been put off, towards the river. Within the plot of the second appellant, Abigail attempted to escape from custody. She was chased, held and brought back. The second appellant advised the others against slashing Abigail with a sword,

"as it was too near his plot".

To pause once again, Abigail here recognized the second appellant by his voice. When the group reached the land of the first appellant, the lamp fell and was broken. The second appellant prevailed upon the others not to cause injury to the captives,

"as that place was near his home".

It is to be noticed that according to Abigail, both the appellants were unwilling to allow any of the captives to be injured within or near their land. The obvious reason for that caution must be that the appellants were careful not to do acts or allow the others to do acts which would involve the appellants with consequences of bad deeds done within their lands. So that what Abigail said she heard her uncles say on the two occasions fits the scenario.

Near a stream beyond the land of the first appellant, the second appellant, according to Abigail, wanted to rape her,

"with a *panga*".

He did not rape her, with or without a *panga*. It is not strange that the first appellant threatened to rape Abigail in the manner he suggested. The appellant was conscious of the fact that Abigail is his niece and he must have found it reprehensible to rape her. The words this appellant must have uttered, to wit, "open your legs and I will rape you using a *panga*" would suggest that the first appellant dared not touch Abigail, his niece. Next, the captives were told to stand near a river and they were ordered to lie down. At this stage, the deceased broke her silence and asked the gangsters for what reason they

wanted to kill her and her children. It did apparently occur to the deceased that the six people were determined to kill them. Immediately thereafter, the first appellant slashed Abigail across the face and said,

“yes you are dead”,

The first appellant uttered sufficient words for Abigail to recognize him before she collapsed, to become conscious in hospital.

Abigail was cross-examined at length and with vigour. She maintained she saw and heard the appellants speak, that the second appellant was carrying a sword whose handle was wooden, and a torch, the first appellant also was carrying a *panga* and that the appellants and the others remained in the house for about thirty minutes and that the journey towards the stream lasted more than thirty minutes so the length of time of the incident was assessed by Abigail as having been one hour. Abigail added that she became unconscious when she was cut on the face, that he recognized the people who untied her but was not fully conscious and that at that time she did not see Nyambane but was later told that Nyambane (PW 10) took her to hospital. Nyambane went to the scene and found the dead body of the deceased. Abigail was there, bleeding. She could not speak as she was being taken to hospital. Nyambane did not speak to Abigail on their way to hospital or at the hospital. Nyambane, the Assistant Chief (PW 7) and Kangere (PW 9) tried to speak to Abigail at the hospital but she could not speak. Our appreciation of the matter is that Abigail must have been in a state of shock when Nyambane found her at the scene bleeding with her dead mother lying where she was. Abgail had been pulled and pushed for more than one hour before she was grievously assaulted. To expect her to have had the presence of mind to speak to Nyambane about what happened is to overlook the serious injury to her person. Actually on the evidence she was not fully conscious, at the very least. Nyambane did not say Abigail refused point blank to speak to him and the two others. Nyambane put it thus,

“we tried to speak to Abigail but she could not speak.”

That is miles away from being failure to speak due to lack of knowledge of what had happened. Abigail was too ill, too weak and too shocked to speak to Nyambane. It must be remembered also that Nyambane was the nephew of the appellants and that there was no blood relationship between Nyambane and the deceased. Perhaps Abigail held the view that a first report to Nyambane, a close relative of the appellants, might weaken what she intended to report to those more concerned with the crime. That, in the circumstances, would not be an unreasonable view to entertain. Abigail, her deceased mother and her sister screamed hard before the six people forcibly entered their house. Not a soul responded. Nobody came to their assistance. Nyambane did not come. He lived in the vicinity. Why should Abigail be expected to give to him the first report" Was she not entitled to distrust Nyambane" Abigail told the assistant chief, an independent person, that the appellants killed her mother. This was in the hospital after she began to speak. It appears that Nyambane did not hear Abigail speak to the assistant chief and Kengere. The Judge noted the discrepancy and preferred the evidence of the assistant chief and Kengere. It would appear that Nyambane did not notice what happened when the doctor visited Abigail since it was in the doctor’s presence that she made her statement. In our judgment, the unwillingness, or failure on the part of Abigail to report to Nyambane is understandable and does not in the slightest affect her evidence of identification by recognition, the central pillar of this appeal, as was suggested by Mr Osoro. The Judge was favourably impressed by Abigail.

It is necessary at this stage to refer to two authorities. The first is the decision in *Roria v Republic*, [1967] EA 583 by which we are enjoined to ensure, in our evaluation of the evidence of Abigail that she is, beyond all reasonable doubt, honest and unmistaken about her identification of the appellants. The

second authority, to the like effect, is the judgment of the English Court of Appeal, Criminal Division, in *R v Tunbull and others,* [1976] ALL ER 549. The case of the appellants depends wholly on the correctness of the identification of the appellants by Abigail. There should be no material discrepancy between the description of the appellants given to the police by Abigail and her evidence in court.

We have examined closely the circumstances in which the visual identification by Abigail came about. The appellants are her uncles whom she had seen and known for a long time. She was aged twenty when her mother was killed. We have considered Abigail's evidence as to the light inside the house and the distance between herself and the appellants inside the house and during the journey towards the stream. Abigail's observation inside the house was not impended in any way. The appellants talked to and about Abigail and her relation outside the house. These matters go to the quality of Abigail's evidence of identification by recognition. The quality is so good that in our respectful judgment, there is no doubt whatsoever in our minds that Abigail recognized the appellants in the gang of six who murdered the deceased. The appellants are joint offenders of the crime.

There is no necessity for the prosecution to prove motive. Here there is evidence, on the one hand, that the appellants desired separately but simultaneously to have a relationship with the deceased, who was a widow, through a liverate marriage. The deceased cold-shouldered the appellants. The appellants were resentful and so during the material night the second appellant told the deceased that she was not going to continue to control the village when the appellants "were the men". On the other hand there were the two funerals for the deceased's husband and his younger brother on September 24, 1981 when the appellants furiously accused the deceased of practicing witchcraft and of killing the brothers of the appellants. The assistant chief (PW 7) told the appellants the deceased and others at the meeting that there was no such practice. However, the appellants who lived in a man's world could have been motivated by the two factors to commit the crime.

It might be otiose but also fair to the Judge for us to say that we think that his factual conclusions which he reached with regard to the evidence of Abigail represented the truth of the situation.

For all those reasons and we hope that they do justice to the arguments of counsel, we have come to the clear conclusion that each appellant was convicted on cogent evidence, that the contention on the grounds of appeal fail and that the appeal is dismissed.

That then is the order of this court.

Dated and Delivered in Nairobi this 22nd day of December 1986.

J.O.NYARANGI

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JUDGE OF APPEAL

H.G.PLATT

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JUDGE OF APPEAL

F.K.APALOO

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JUDGE OF APPEAL

I certify that this is a true

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