



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL CASE 97 OF 2009

REPUBLICPROSECUTOR

VERSUS

ESTHER WAMBUI MWANGIACCUSED

JUDGMENT

Esther Wambui Mwangi, the accused is charged that on 13th November, 2009 at Mwisho Wa Lami Centre in Mau Narok, Njoro she murdered her five (5) year old sister, **Rebecca Mumbi** (the deceased).

PW4, Sarah Nungari Mute, the mother to both the accused and the deceased person left the deceased under the care of the accused, who was at the time aged 23 years. She had returned to her mother's home with her two children after her marriage failed.

On the fateful day she sent the deceased to the shops to buy rice. According to two witnesses, **15** years old, **PW1 John Mwangi Njoro (John)** and **11** year old, **PW3 Samuel Wanjohi (Samuel)**, they saw the accused repeatedly beat the deceased using sticks until she (the deceased) fainted. After this the accused washed the deceased and laid her lifeless body on the bed.

John reported the incident to his father **PW5 Joseph Njenga Kanyi** who went to the house where the deceased was and confirmed that the deceased was indeed dead. The accused who had gone for her mother returned with her. The mother fainted on seeing the deceased. The incident was reported to the police and the accused arrested.

Dr. John Omboga conducted post mortem examination on the body of the deceased. He noted bruises on the left leg, forehead, head, and cheeks. He concluded that the deceased died as a result of severe head injury caused by blunt object trauma.

In her defence the accused explained that she had sent the deceased to the shops to buy rice. She took long to return prompting the accused to go for her. She found her crying because she had been attacked by unknown boys who took the rice and hit her on the head with a catapult, causing an injury to the head. The accused took the deceased home and gave her painkillers as she complained of headaches. The accused went to call their mother with whom she returned only to find the deceased dead. She (the accused) was shocked but the villagers suspected her hence caused her to be arrested. She explained that their neighbours did not like her.

I have considered the evidence by both the prosecution witnesses and that of the accused person.

From the medical evidence, it is not in doubt that the deceased died as a result of severe head injuries which were caused by a blunt object. The only eye witnesses to this incident were two children, 15 year old **John** and 11 year old **Samuel**. The two witnesses although children gave graphic account of the events leading to the death of the deceased.

From that evidence it is clear that the accused was not satisfied with the explanation of the deceased as to what happened to the money she had been sent with to shop. It would appear from that evidence that the deceased could not account for the money (Kshs.10/- or Kshs.20/-).

From the account of the two eye witnesses it is apparent that the beating took some time. It started in front of the house, went to the rear part of the house and finally inside the house. The accused then washed the deceased before laying her on the bed. All through this, the two witnesses followed the accused and watched the assault. The accused talked to **Samuel** asking him to find out from the deceased where she had taken the money. At some stage, the accused even asked the two witnesses to go away and warned them not to report the incident.

As a matter of fact the accused person's mother confirmed in her testimony that the two witnesses explained to her how the deceased met her death. Does the evidence of the two witnesses require corroboration being evidence of children?

In terms of **section 19** of the **Oaths and Statutory Declaration Act**, evidence of a child of tender years called as a witness, who in the opinion of the court does not understand the nature of an oath, may be received if in the opinion of the court such a child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of telling the truth.

The act does not define the age bracket of "*a child of tender years.*" **Section 2** of the **Children Act** defines such a child to mean a child under the age of ten years. It has, however, been held in **John Otieno Oloo v R** Criminal Appeal No.350/2008 that that definition:-

“ . . . is for purposes of Children Act, 2001 (Act No.8 of 2001) and may not necessarily be applicable in respect of cases such as the one that is now before us on appeal which is a matter instituted under the Penal Code, and so is for purposes of section 19 of the Oaths and Statutory Declaration Act.”

A similar question arose in the case of **Johnson Muiruri v R** (1983) KLR 445 where the court held as follows:

“The matter whether a child is of tender year or not is a matter of good sense of the court where there is no statutory definition of the phrase. In Kenya there is no statutory definition of the expression “*child of tender years*” for purposes of section 19 of the Oaths and Statutory Declaration Act (Cap 15)”

(Emphasis supplied)

See also **Kinyua v R** (2002) KLR at page 265.

The court in **John Otieno Oloo v R** (Supra) also held that corroboration of a child of tender years is only necessary where such a child gives unsworn evidence. The court cited the case of **Johnson Muiruri v R** (Supra) where the law was stated thus:

“Where a child of tender years gives unsworn evidence, then corroboration of that evidence is an essential requisite. But if a child gives sworn evidence, no corroboration is required but the assessors must be directed that it would be unsafe to convict unless there was corroboration.”

(Emphasis mine)

It is clear from the decisions in **John Otieno Oloo v R**, **Yaga v R** (2001) 1 EA 318 and **Kibangeny**

Arap Kolil v R (1959) EA 92 that the definition of a child of tender years is limited to a child under 14 years of age.

It follows from these authorities that the evidence of a child of tender years given on oath after *voire dire* examination requires no corroboration in law. But, in practice the court must warn itself of the dangers of basing a conviction on the evidence of a child of tender years without looking for corroborating evidence.

In the case before me, **John** was clearly not a child of tender years being 15 years of age. His evidence therefore did not require corroboration. **Samuel** on the other hand was aged **11 years** and therefore a child of tender years. However, after *voire dire* examination the court was persuaded that he understood the nature of an oath and proceeded to administer the usual oath. Having testified on oath, his evidence, similarly, did not require corroboration. But if corroboration was required there is the evidence of John, **PW4, Sarah Nungari Mute**, the mother to the accused; the evidence of **PW5, Joseph Njenga Kanyi**, and that of the doctor. The combined effect of their evidence supported Samuel's testimony on how the accused attacked the deceased person

I find that there is overwhelming evidence to prove that the fatal injuries on the deceased were inflicted by the accused. Her defence to the effect that some strange boys inflicted them is unbelievable. First the two eye witnesses were credible. Secondly the accused stated that the deceased had an injury on the head only, yet there were several injuries on the head and legs, which were consistent with the description given by the two eye witnesses of how the deceased was beaten with sticks.

In the result, I find that the accused caused the death of the deceased. The next question is whether in causing the death of the deceased the accused did so with malice aforethought. Again from the evidence of the two eye witnesses the accused repeatedly and for a considerable period of time beat up the deceased using sticks. The witnesses saw the accused use one stick after the other, breaking them on the deceased. One stick had a nail which she aimed on the head of the deceased.

The deceased pleaded to be allowed to go to sleep but the accused could hear none of that. She beat her in front of the house, at the rear and even inside the house (under the bed). Even when it was apparent that the deceased was weak, the accused did not stop. In the end she inflicted multiple injuries on the head and legs of a child aged only five (5) years. From these facts, it is clear to me that the accused intended to do grievous harm to the deceased.

I come to the conclusion that the prosecution has proved beyond any reasonable doubt the charges of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**.

I find the accused person guilty and convict her accordingly.

Dated and Delivered at Nakuru this 23rd September, 2011.

W. OUKO
JUDGE