IN THE COURT OF APPEAL

AT NAIROBI

(Coram:Madan, Potter JJA & Chesoni Ag JA)

CRIMINAL APPEAL NO. 44 OF 1982

BETWEEN

J M.....APPELLANT

AND

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant J N M was convicted by the High Court (Masime J) of the murder of A N. He was sentenced to death. His appeal to this court is founded upon the following grounds of appeal, ie the learned judge erred in finding the appellant guilty of murder upon inadequate, uncorroborated, wrongly admitted or inadmissible corroborated evidence, in admitting the evidence of children of considerable tender years, in finding the appellant was not drunk so as to be incapable of forming the requisite specific intention for the offence of murder, in not affording the appellant mitigation on the ground of intoxication, in ignoring the issue of provocation, in failing to give reasons for the sentence passed without an opportunity to the appellant to state any mitigating factors, and the sentence was harsh and excessive.

The appellant and the deceased were living together on the fourth floor of [Particulars Withheld] House in Mfangano Street, Nairobi. They occupied one of the two bedrooms. The other bedroom was occupied by the deceased's infant son. Others also living in the premises were the deceased's older son S M and her cousin E G.

The appellant and the deceased returned home at about 11 pm on the night of November 3, 1980. They went upstairs to their bedroom. After a while G and M heard noises. The deceased also called upon G for help. G went to her bedroom followed by M. He found the bedroom door locked. He looked through the window and saw the appellant stepping on the deceased's stomach. She was lying on the floor. G woke up W and obtained from her a duplicate key and opened the door of the bedroom. W also heard a lot of noise from the room. The appellant threatened to kill them if any of them interfered. The appellant came out of the room carrying the deceased over his right shoulder. The deceased was struggling and groaning. The appellant entered W's room carrying the deceased. He threw her out of the verandah. The deceased fell on the second floor. The appellant rushed out of the house. The deceased was still alive when taken to hospital where she died later.

On post-mortem examination the deceased was found to have broken left arm, abrasion on her face, forehead and body, a fracture of the right temple of the skull to the left temple, and bleeding over the brain. The cause of death was bleeding over the brain due to fractured skull due to injury with a blunt

object. The skull was in two pieces. The injury was consistent with a fall. The foregoing is a synopsis of the prosecution case against the appellant. The evidence upon which the prosecution case was based was as follows.

G saw the appellant in the bedroom as related above, also when he came out carrying the deceased and went towards W's room. While he was passing the appellant pushed G who fell down. He did not see the appellant enter W's room but he did see him come out of her room and rush out of the house. G went into W's room and looked down the verandah. He saw the deceased lying on the second floor. The two eye-witnesses to what the appellant did to the deceased after he went into W's room were M and W. These are the two witnesses referred to as children of considerable tender years in the memorandum of appeal. We leave for the moment the learned judge's treatment of the two children as witnesses.

We once again wish to draw the attention of our courts as to the proper procedure to be followed when children are tendered as witnesses.

In *Peter Kiriga Kiune,* Criminal Appeal No 77 of 1982 (unreported) we said:

"Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion , on a *voire dire* examination, whether the child understands the nature of an oath in which even his sworn evidence may be received. If the court is not so satisfied his unsworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him (section 19, Oaths and Statutory Declarations Act, cap 15. The Evidence Act (section 124, cap 80).

It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided, and not be forced to make assumptions."

A similar opinion was expressed by the Court of Appeal in England recently in *Regina v Campbell* (Times, December 10, 1982):

"If the girl (ten years) had given unsworn evidence then corroboration of those issues was an essential requisite. If she gave sworn evidence there was no requirement that her evidence had to be corroborated but the jury had to be directed that it would not be safe to convict unless there was corroboration.

Dealing with the question of the girl taking the oath it should be borne in mind that where there was an inquiry as to the understanding of a child witness of the nature and solemnity of an oath, the Court of Appeal in *R v Lal Khan* [1981] 73 Cr App R 190 made it quite clear that the questions put to a child must appear on the shorthand note so that the course the procedure took in the court below could be seen …

There Lord Justice Bridge said:

'The important consideration … when a judge has to decide whether a child should properly be sworn, is whether the child has sufficient appreciation of the solemnity of the occasion and the added responsibility to tell the truth, which is involved in an oath, over and above the duty to tell the truth which is an ordinary duty of normal social conduct.'

There were therefore two aspects when considering whether a child should properly be sworn: first that the child had sufficient appreciation of the particular nature of the case and, second a realisation that taking the oath did involve more than the ordinary duty of telling the truth in ordinary day-to-day life."

It is fortunate that we can reinforce some of the foregoing views by the decisions of our own former perceptive Court of Appeal. As long ago as in *Oloo s/o Gai v R* [1960] EA 86 the Court of Appeal said that it would have been better for the trial judge to record in terms that he had satisfied himself that the child understood the nature of an oath; since the judge had failed to direct himself or the assessors on the

danger of relying on the uncorroborated evidence of a child of tender years and had also overlooked significant items of evidence bearing on the reliability of her evidence the conviction could not stand.

In *Gabriel s/o Maholi v R* [1960] EA p 159, again our former Court of Appeal said that even in the absence of express statutory provision it is always the duty of the court to ascertain the competence of a child to give evidence; it is not sufficient to ascertain that a child has enough intelligence to justify the reception of the evidence, but also that the child understands the difference between truth and falsehood.

In *Kibangeny Arap Kolil* [1959] EA 92 the Court of Appeal held (i) that since the evidence of the two boys (12-14 years and 9-10 years) was of so vital a nature the court could not say that the trial judge's failure to comply with the requirements of section 19(1) of the Oaths and Statutory Declarations Ordinance was one which could have occasioned no miscarriage of justice; (ii) the failure of the trial judge to warn either himself or the assessors of the danger of convicting upon the evidence of the two boys in view of the absence of corroboration and any admission by the appellant was an additional ground for allowing the appeal.

We now proceed to examine what transpired in the court below as regards the evidence of S M and W.

M was sworn straightaway. He gave his age as fifteen years. The judge examined him about his school career, whether he attended church.

M also told the judge that the value of truth lay in fearing God. At this point the judge noted that M was not of tender years and allowed the already sworn M to continue with his evidence. W was 13 1/2 years old at the time she gave her evidence in court. She was a child of tender years. *Kibangeny Ole Kolil* (supra). In her case the learned judge substantially followed the correct procedure before allowing her to be sworn, by recording his examination of her whether she was possessed of sufficient intelligence to justify the reception other evidence, and that she understood the duty of speaking the truth.

M was not a child of tender years. *Kibangeny Ole Kolil* (supra). The former Court of Appeal approved the dictum of Lord Goddard CJ in *R v Campbell* [1956] 2 All ER 272 that "whether a child is of tender years is a matter of the good sense of the court ... where there is no statutory definition of the phrase." There is no definition in the Oaths and Statutory Declarations Act of the expression 'child of tender years' for the purpose of section 19. The inquiry conducted by the judge in the case of M was a cautious probe to the advantage of and not prejudicial in any way to the accused.

Both M and W testified on oath that they saw the appellant go into W's room carrying the deceased on his shoulder. They also saw him throw her over the verandah and she fell down. S M was also threatened with death by the appellant if he and G interfered. M had also seen the appellant come out of his bedroom with the deceased draped over his right shoulder.

The appellant made an unsworn statement. He called no witnesses. He told the court that at about half past seven on the evening of November 3 he went with the deceased and G to a bar where the three of them were drinking beer until closing time at 11.30 pm when they left to go home as none of them wanted more beer. They were all "very drunk". They met and greeted their watchman. M opened the door to them. They went upstairs to their bedroom to sleep. After about two minutes the deceased begun changing her clothes. He asked her why she was doing so. She told him that she wanted to go out for more beer. She asked him for the keys of the car. The appellant told her she was already drunk. He refused to give her the keys. She started to make a noise. She said she must go. She continued to demand the car keys. She hit him with a glass on his face, she started to move towards the door. He pulled her back on to the bed and slapped her. He closed the door. She then said she would not go. He was bleeding where she hit him. She gave him some papers to dry the blood. She sat on the bed and told him she had not meant to hit him. He told her he also did not mean to slap her, she should not drink too much beer and also forget about her former boy friend who had died and who was the father of her child. He told her if she still wanted to go she could do so, and gave her the keys to the door. She said she would not go. G came in after opening the door. He found the appellant in the bedroom and the deceased in the bathroom. She came out and went to W's room. Githinji asked her why she wanted to return to the bar. That was

when he the appellant went there. G told her she had had enough beer, and she would not get the car keys. The deceased said she had the right to drink the whole night if she wished. She then went backwards to the verandah. She said her husband was dead and she would die also. “She ran at once and jumped the verandah.” The appellant was astonished and ran out of the house at once. He did not know where he went. He left G screaming. He also lost his mind when he saw his friend N had thrown herself and did not think of going to her help where she had fallen. When he regained his mind he found himself at the stadium. He went to a friend’s house at Bahati where he slept till the morning. He later went to his brother’s place of work. He told his brother about the incident. They went to Kenyatta National Hospital where they were told the deceased was dead. He went home, slept and then thought very much about N. He bought and took medicine because he decided to kill himself.

The appellant had given much the same details of the events which took place in their bedroom on the fatal night in his voluntary charge and caution statement which he made on November 11, 1980. He denied killing N. He said they were both drunk. They returned from the bar with G. The deceased ran backwards towards the verandah. She fell down to her death. He attempted to commit suicide by drinking a substance called “coopetex”. Before having a look at the judgment of the trial judge we would confirm that the prosecution also adduced evidence which indicated a struggle had taken place in the bedroom, there was blood and also bloodstained sheets and tissues there; secondly, that the appellant did attempt to commit suicide.

The learned trial judge recounted the prosecution evidence, the appellant’s unsworn statement, correctly pointed out upon whom the burden of proof lay and said the appellant’s unsworn statement suggested the defence of drunkenness, or alternatively, suicide by him. He pointed out, again correctly, that as regards intoxication he had to be satisfied that the appellant was intoxicated through no fault of his own, to such an extent as to be temporarily insane. He rejected the attempt to commit suicide by the appellant as defence to a charge of murder.

The serious conflict between the prosecution evidence and the appellant’s unsworn statement was whether G was at home on the evening of November 3 as he claimed, or whether he was out with the applicant and the deceased and drinking with them in a bar and they returned home together. Secondly, whether the appellant came out of his bedroom carrying the deceased on his shoulder, went into W’s room, and threw her out of the verandah to a floor down below. Thirdly, whether the deceased committed suicide by jumping over the verandah to fall to her death.

The learned judge believed the evidence of G, M and W. He did not warn himself that notwithstanding W’s evidence was sworn it would be prudent to look for corroboration. This omission did not cause a miscarriage of justice. Her evidence was corroborated. G’s evidence that he was at home and not drinking with the appellant and the deceased in the bar was corroborated by the evidence of the watchman who said only the appellant and the deceased returned to the house. G and M corroborated each other up to the appellant’s exit from the bedroom carrying the deceased over his shoulder. M and W corroborated each other that the appellant went into W’s room with the deceased and threw her out of the verandah. The learned judge erred in thinking that G’s evidence was corroborated by the evidence of the police officer who took photographs the next day which showed that the deceased’s bedroom was very much disturbed. In as much as G’s evidence did not require corroboration this misdirection was of no consequence.

In order to reject the evidence of G, M and W the court must first accept that G, for no apparent motive, plotted with the two children M and W, also without any apparent motive, a complicated series of events including the melodramatic and startling detail of the throwing of the deceased out of the verandah by the appellant. We are also satisfied that the evidence of these three witnesses was worthy of belief, and the learned judge acted properly in accepting it. It follows that the appellant’s explanation that the deceased committed suicide must be false.

There was no evidence that the appellant and the deceased were drunk that evening. The watchman said that they appeared normal to him, they were not drunk. M said they both appeared normal, there was nothing strange about them. Wsaid they did not appear drunk. State counsel Mr Nebutete submitted, rightly in our view, that the appellant’s conduct after he and the deceased returned to the bedroom in

locking the door, the lengthy discussion he carried on with the deceased that she should not go out again for more beer, his threat to G and M that he would kill anyone who entered and carrying the deceased on his shoulders out of the bedroom to the verandah through W's room from where it could be thrown over, completely negative the suggestion that the appellant was drunk so as to be incapable of forming the intention to kill. The appellant knew or must have known what he was doing, also that throwing the deceased two floors below could cause grievous harm as indeed it did. His act constituted malice aforethought.

No provocation of any kind was shown to have come from the deceased. If the attack with the glass is intended to constitute provocation then according to the appellant's own unsworn statement the incident was patched up between them after which the deceased herself went to W's room.

Before the sentence was passed the appellant's advocate told the court there was no motion of the judgment. The appellant himself said that he had nothing to say why sentence should not be passed upon him according to law. Although Mr Muli who appeared before us on behalf of the appellant abandoned the ground of appeal that the sentence was hard and excessive we would point out that the sentence was neither harsh nor excessive upon a murder. The mandatory sentence for murder is sentence of death as provided in section 204 of the Penal Code.

The three assessors were unanimously of the opinion that the appellant was guilty of murder. We would mention one point in relation to the assessors. In his summing up the learned judge told them that the appellant made an unsworn statement which could not be tested by cross examination. It is the statutory right of an accused person to choose to make an unsworn statement in his defence in court. His decision to do so should not be made the subject of unfavourable comment, indeed not any kind of comment at all.

The appeal is ordered to be dismissed.

Dated and Delivered at Nairobi this 15th day of April 1983.

C.B.MADAN

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JUDGE OF APPEAL

K.D.POTTER

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JUDGE OF APPEAL

Z.R.CHESONI

.....

AG. JUDGE OF APPEAL

I certify that this is a true copy of the

original.

DEPUTY REGISTRAR