IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Madan, Law & Potter JJA

CRIMINAL APPEAL NO. 80 OF 1980

Between

KIJIBA.....APPELLANT

AND

REPUBLIC .....RESPONDENT

(Appeal from the High Court at Nairobi, Chesoni J)

JUDGMENT OF THE COURT

The appellant is appealing against his conviction for the murder of John Kilonzo. At about 4.30 pm on September 5, 1979, the deceased was returning home form school with five companions. A man appeared, caught hold of the deceased, and forcibly took him away with him. The deceased was not traced until September 11, when, in the words of the learned trial judge, his half decomposed and half naked body was found in the bush in the Langata area. The post mortem examination of the deceased's body was carried out by Dr Muturo. The original of his report having become lost he signed a copy thereof, and also looked at a booklet of photographs of the deceased's body before giving his evidence on the day the appellant's trial opened in the High Court on November 3, 1980. The substance of the first three grounds of appeal is that the learned judge erred in accepting Dr Muturo's evidence as the cause of death because he refreshed his memory before giving evidence by looking at the photographs and the copy of his report which was declared inadmissible, the submission being that oral evidence of facts taken from an inadmissible document is also inadmissible. Dr Muturo gave his evidence from memory because he could remember what he did even after looking at the photographs which were admissible in evidence. Dr Muturo's oral evidence was admitted, not the copy of his report. Unless the oral evidence itself is inadmissible it does not become inadmissible because the witness refreshes his memory from an inadmissible document. Upon post-mortem examination the deceased was found to have multiple lacerations over his face and scalp. The muscles of the legs had been devoured by wild animals. There were two sharp carved deep cuts on the lower side of the devoured muscles with a curved line facing up like a cup. The left humerus bone and the left elbow joint were fractured. The anal part of the rectum was inflamed and swollen consistent with sodomy. There were lacerations over the back of the body, and the lower jaw was fractured as also the occipital bone. The brain had decomposed and was mixed with blood. The cause of death was brain haemorrhage due to injury with a blunt instrument. We have no doubt that whoever inflicted these injuries had malice aforethought so as to constitute murder.

Four of the deceased's companions – Hussein Mohamed, Adan Ngunyo, Peter Mwangi and Mohammed Guyo, testified that a man caught hold of the deceased, knocked him down on a stone and took him away with him; that the fifth companion, Ibrahim Mohammed, went over and asked the man to leave the

deceased alone. Ibrahim Mohammed came back and told them that the man said he was taking the deceased to the police. Ibrahim Mohamed at first denied knowing the man who disappeared with the deceased. He was allowed to be recalled by the prosecution. On the second occasion he testified that he knew the appellant when they were living in the Langata area and he used to see him many times; that he felt afraid on the first occasion because he thought, quite wrongly, that his parents were in police custody in connection with this incident. Ibrahim Mohamed, Hussein Mohamed, Adam Ngunyo and Mohamed Guyo later each identified the appellant at separate identification parades because they said they knew him previously. The appellant himself confirmed at those identification parades that these four witnesses knew him, that he had normally visited the family of Ibrahim and Hussein that all these witnesses knew his name which was why they were able to pick him up. When Peter Mwangi failed to identify him the appellant said that that was alright. He expressed satisfaction with the way the identification parades were conducted. Peter Mwangi was the only one of the children who did not know the appellant before the incident.

The appellant was a soldier in the Kenya Army. On September 13, he was charged and cautioned with the murder of the deceased. He volunteered to make a statement to the police which he later also adopted as his defence in court. He said in the statement that he returned with other soldiers by train from Mombasa on September 4. On Wednesday September 5, they cleaned their arms until 4.30 p.m. He then went to the mess where he bought some *miraa* which he continued chewing while he was in the camp. He did not leave the camp that day. He did not know the child he was alleged to have killed, or anything in connection with the charge. The appellant having put up an alibi as early as on September 13, it became the duty of the police to investigate it, to establish or refute it as the case may be. The prosecution called three witnesses in this connection, and in respect to whom they served notice of additional evidence. The three witnesses were Joseph Muthuka (PW 10), Mohamed Adam (PW 12) and Hussein Faiza (PW 15). There is no copy of the notice on record, but it appears from the original file that the first notice of additional evidence which was served on the appellant's advocate was dated 24th October, 1980. It listed the names of these three witnesses among others, in the following form:-

1. Joseph Muthuka, c/o Sirichand Manufacturing Ltd., Industrial Area, P.O. Box 46312, Nairobi – saw accused dragging the child away.
2. Hussein Faiza, c/o Kibera Lindi Village, Winvex Security Ltd., P.O. Box 1126, Nairobi, - Received information that accused was in Kibera on the day in question.
3. Mohammed Adam alias Guyo Mohamed c/o Kibera Lindi Village. A second notice of additional evidence was also served, was dated 5th November, 1980. It referred to:

> Mohammed Adam, alias Guyo Mohamed c/o Kibera Village – He saw the accused in Kibera on the day in question.

A third notice of additional evidence, also served, dated 7th November, 1980, was as follows:

> Hussein Faiza c/o Kibera Lindi Village, Winvex Security Ltd. P.O. Box 11261, Nairobi – saw accused at Kibera on 5th day of September, 1979.

The defence objected to these three witnesses giving evidence on the ground that the prosecution had not complied with section 301 of the Criminal Procedure Code. The same objection has been raised before us again on the ground that none of the three notices stated the substance of the evidence which the witnesses intended to give. Section 301 reads:-

> "(1) No witness who has not given evidence at the preliminary inquiry shall be called by the prosecution at any trial, unless the accused person has received reasonable notice in writing of the intention to call such witnesses:- Provided that…….
> (2) A notice under subsection (1) of this section shall state the witness' name and address and the substance of the evidence which he intends to give; the court shall determine what notice is reasonable, regard being had to the time when and the circumstances under which the prosecution became acquainted with the nature of the witness's evidence and

determined to call him as a witness."

In our opinion none of the three notices served by the prosecution complied with the provisions of section 301. All three notices were sketchy, indeterminate and insufficiently indicative of the real substance of the evidence which the three witnesses intended to give. Such brevity does not comply with section 301. If the defence wanted to rebut the evidence of the three witnesses or any of them, on the basis of the notices served by the prosecution, they would not have known how exactly to prepare themselves.

We affirm the following passage in the judgment of the former Court of Appeal in *Haining v Republic* [1970] EA 620 at p 624:-

> "It is quite clear that the intention behind section 273 of the (Tanganyika almost verbatim to our section 301) Criminal Procedure Code is:-
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> (a) that all evidence known to the prosecution at the time of the preliminary inquiry and which it is intended to call shall be disclosed at the preliminary inquiry;
> (b) that where it is later decided that some evidence which it was not intended to call, ought to be called, that evidence shall be disclosed as soon as possible after the decision to call it and
> (c) that where relevant evidence is discovered after the preliminary inquiry, it shall be disclosed as soon as possible after its discovery. Where notice of intention to call additional evidence has been served, and the defence contend that notice was not given within reasonable time, the trial court has to decide whether the notice was reasonable. In reaching that decision, the court must take into account the factors mentioned in sub-s.(3) of section 273 and may, we think, take into account any other relevant factors. In particular, we think the court may, and indeed must, consider the nature of the evidence and in particular its importance, its complexity, the likelihood of surprise and the possibility that evidence and in rebuttal which might have been available earlier may no longer be available. Notice which would be quite reasonable for some simple, perhaps formal, evidence may be wholly inadequate for evidence of a complex and highly incriminatory nature".

A notice of additional evidence should be served as soon as possible after it is decided to call additional evidence. The notice should set out a proof of the additional evidence as nearly as possible akin to a deposition at a preliminary inquiry. It is not enough to state a half dozen or few more words which may be wholly inadequate to convey fairly the substance of the evidence which the witness intends to give. We are of the opinion that the learned judge erred in holding that the prosecution had complied with section 301 in regard to the additional evidence of Joseph Muthuku, Mohammed Adam and Hussein Faiza. We will disregard their evidence for the purpose of this appeal. Three army officers gave evidence for the defence – Sergeant Kilonzo, Sergeant Kadele and Lance Corporal Buke Jilo. According to their evidence, the appellant never left the barracks on September 5.

The learned judge pointed out the appellant claimed in his statement that on September 5 he worked in the Armoury Store cleaning arms the whole day until 4.30 p.m. when he stopped working; that he did not go out of the barracks on the day, whereas the three army officers said that on September, 5 the appellant and other stopped working at 5.30 p.m. that Sergeant Kilonzo who was in charge of the group working at the armoury store said that the appellant did not work there but that he was at the tents; that Sergeant Kadele who was overall in-charge swore that he was with the appellant all the time at the tents; that even Lance Corporal Jullo said at first that he and the appellant did not go to the tents but worked at the armoury store. The learned judge said these discrepancies showed that the three army officers did not know where the appellant was on September 5, also that they did not see him whenever they said they saw him working, that they had told the court untruths, each displaying the qualities of an untruth witness in the witness box. He was not impressed by their demeanour. They were over-zealous on behalf of the accused, and overexaggerated the security system when they said it was impossible for any soldier to go out of the barracks without a leave pass and not be detected and reported. The learned judge also pointed out other discrepancies of detail which he set out and which satisfied him that the appellant was not at the barracks for the whole day on September 5. He held that the appellant's alibi was untrue and did not raise a reasonable doubt.

The appellant's advocate, Mr Kirundi, who ably urged the appeal before us as did Mr Nebutete for the Republic, submitted that the appellant was not identified properly – the children were very frightened, and they held a discussion between them about the appellant which helped them to identify him; that in any event Ibrahim Mohamed was a wholly unreliable witness. Further, the learned judge erred in find corroboration for the children's evidence in the evidence of Joseph Muthuka, Mohammed Adam and Hussein Faiza who could not be relied upon. The evidence of these three witnesses is no longer for consideration. We also discount the testimony of Ibrahim Mohammed who gave conflicting accounts to the court of what he said had happened. On our evaluation of the evidence the appellant was seen by three children when he caught hold of the deceased. Those three children knew him previously and they recognised him. It was a case of recognition really as the appellant himself confirmed it at the identification parades. Children can make good witnesses, and they often do make good witnesses. Two of the three children gave sworn evidence which not require corroboration. The unsworn evidence of the third child Adam Ngunyo was corroborated by the other two children who also corroborated each other, and the appellant himself corroborated the evidence of the three children by the remarks he made at the identification parades that they knew him previously. The learned judge was fully justified in accepting their evidence, also in rejection the evidence of the three army officers. In our opinion also the nature of the prosecution evidence was such as to satisfy us that the appellant's alibi could not be true. The appellant was seen catching hold of the deceased, doing violence to him by knocking him down on a stone, and forcibly abducting him away from his school companions which led to the irresistible inference that the child who was not seen alive again was killed by the deceased. The totality of the circumstantial evidence could only lead to the conclusion, as it did, that these proved exculpatory facts were incompatible with the appellant's innocence and incapable of explanation upon any other hypothesis than that of his guilt.

The three assessors advised the learned judge that the appellant was guilty of murder. The learned judge was also satisfied and convicted him accordingly. We in turn are also so satisfied. The appeal is ordered dismissed.

DATED nad delivered at Nairobi this 20th day of November, 1981.

C.B MADAN

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JUDGE OF APPEAL

E.J.E LAW

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JUDGE OF APPEAL

K.D POTTER

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR