



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: E. M. GITHINJI, HANNAH OKWENGU & J. MOHAMMED, J.J.A.)

CRIMINAL APPEAL NO. 33 OF 2014

BETWEEN

JOHN WANGIRA ORJAMA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An Appeal against the judgment of the High Court of Kenya at Busia (A. M. Msagha, J.) dated 15th July, 2009

in

HCCR NO. 2 OF 2007)

JUDGMENT OF THE COURT

[1] The appellant was convicted by the High Court of the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code.

[2] Eight witnesses gave evidence at the trial essentially as hereunder:

On 11th August, 2004, **Hassan Arosi (Hassan)**; **Dennis Arusa** and **Dennis Issa Arosi (Issa)** were planting sugar cane in the land (*shamba*) of their parents. Hassan and Issa are brothers. The parents of Hassan and Issa were also in the shamba planting sugarcane. At about midday, Dennis was sent to fetch drinking water from the house. On his way back to the shamba, Dennis heard a woman groaning in nearby bushes. He called those who were in the shamba. Hassan and Issa are among the people who responded and went towards the place where the noise was coming from. This was near the same bushes. On reaching there, they saw a person whom they identified to be the appellant emerge from the bushes where a woman was lying and run away towards the forest. On going nearer, they found a woman who they identified as the deceased lying down facing downwards with a leso wrapped around her neck. There was a jembe nearby. The deceased was not talking. The parents of Hassan and Issa went to the scene.

[3] The matter was reported to **Fredrick Iseme Olloo (Fredrick) (PW7)**, a village elder, who went to the scene and found the children who gave the name of the appellant as the person they saw running from the scene. After viewing the body of the deceased, Fredrick instructed **Benjamin Egesa** – his aid to arrest the appellant and reported at **Nambale Police Post**. **Sgt. Simon Misiko (PW 8)** visited the scene in the company of Fredrick. He found the body of the deceased lying in the bush close to a road. He observed that the deceased had bruises on the neck, and that a knotted leso had been tied around her neck. The body was taken to Busia District Mortuary. The appellant was arrested in his house on the same day.

[4] On 17th August, 2004, **Dr. E. K. Njau** performed a post-mortem on the body of the deceased and post-mortem report was produced as exhibit by **Dr. Zakaria Gathumu Njau** of Busia District Hospital. The body of the deceased had multiple bruises on the forehead, intercranial haematoma, fracture of cervical spine and blood from ears and nostrils.

The doctor formed the opinion that the cause of death was cardio respiratory arrest secondary to strangulation and intercranial hemorrhage. The doctor also assessed the appellant's mental status and found the appellant to be of sound mental status. The two reports were produced as exhibits under **section 77** of the Evidence Act with the concurrence of the appellant's counsel.

[5] The appellant gave unsworn evidence at the trial. He stated that he was at home on 11th August, 2004 - 7.00 am to 1.00 pm when Benjamin Egasa (*Benjamin*) - an aid to the village elder went there and told him that the village elder wanted to see him; that he accompanied Benjamin to the village elder's home but did not find him; that they went to the Chief's office where Benjamin left him and later came back with police officers who arrested him. He stated that he was charged with the offence of murder which he did not commit.

[6] The trial judge made a finding that the evidence of Hassan, Dennis and Issa required corroboration; that the post-mortem report corroborated the evidence of the three children that death was caused by another person; that the conduct of the appellant of running away from the scene pointed to his guilt and that there was no evidence that there was any other person at the scene other than the appellant. Ultimately the learned judge made findings thus:

“The groaning of the deceased just before Dennis and the other two boys saw the accused run away; the discovery of the deceased soon after are events so closely related; that the only person who was responsible for the death of the deceased can only be the accused person; and so in this case, there is direct evidence of the three young boys which has been corroborated by the postmortem report and the circumstantial evidence drawn from the conduct of the accused person. All these events lead this court to conclusively find that the accused person committed the offence.”

[7] The appeal is based on two grounds, firstly, that the learned judge erred in law and in fact in relying on shaky circumstantial evidence, and, secondly, in failing to find that the prosecution had not proved its case beyond reasonable doubt. **Elizabeth Odhiambo**, the appellant's counsel submitted that there was weakness or break in the chain in that, it emerged from cross-examination that Issa had not seen the appellant, postmortem report could only have corroborated the nature of the death and not the fact that it is the appellant who committed the offence; that the possibility that **Sereno Okemo** who was arrested was involved was not considered and that the prosecution did not prove whether the appellant was seen with the deceased prior to the commission of the crime.

[8] On the other hand, **Mr. Ketoo** for the respondent opposed the appeal and submitted that Hassan and Dennis knew the appellant as a neighbour for two years; the evidence of Dennis corroborated the evidence of Hassan; that although Issa may not have seen the face of the appellant, he described the clothes that the appellant was wearing which corresponded with the description of clothes by Hassan and Dennis; that the appellant was arrested shortly thereafter and that the circumstantial evidence was cogent and complete.

[9] Both Hassan and Dennis were aged 14 years at the time of the trial while Issa was aged 16 years. **Section 19** of the Oaths and Statutory Declarations Act (*Chapter 15*) of the Laws of Kenya expressly governs the reception of children of tender years (*emphasis added*).

Section 124 of the Evidence Act provides:

“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act where the evidence of the alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for any offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him. Provided ...”

Section 2 of the Children Act which commenced on 1st March, 2002 defines a “*child of tender years*” as a child under the age of ten years. It follows that Hassan and Denis were not children of tender years at the time of trial. Similarly, Issa was aged 16 years at the time of the trial and was not a child of tender years. Thus, the evidence of each of the three witnesses could be relied on and be a basis of a conviction without corroboration.

Therefore, the findings of the trial judge that the three witnesses were children of tender years and their evidence required corroboration is to that extent erroneous in law.

[10] The conviction was dependent on the credibility of Hassan, Denis and Issa. When Fredrick, the village elder, visited the scene, he found all the three witnesses there. All the three witnesses testified that they knew the appellant and the deceased very well before, as both came from the neighbourhood. The incident happened in early afternoon. Hassan said that he saw the face of the appellant and the appellant had nothing on his head. Denis testified that he was about 10 metres from the appellant and that the appellant was wearing a blue T-shirt with yellow and red horizontal stripes.

Issa also described the part of the clothes that the appellant was wearing. He stated that the appellant was wearing a blue T-shirt which description is consistent with the description given by Denis. On cross-examination, Issa admitted that in his statement to police he stated that he asked Denis the identity of the man who was running away. However, he insisted that he had seen the appellant. All the three witnesses stated that there was nobody else at the scene. The name of the appellant was given immediately to the village elder. The learned judge evaluated the evidence and said in part:

“It is also common ground that the accused was seen emerging and running away from the scene where the body of the deceased was found. This confirmed that the accused person was at the scene where the body of the deceased was found and I have no doubt whatsoever that the three young men said the truth.”

It is thus evident that the trial judge considered the credibility of the three witnesses and believed that they were telling the truth.

[11] The Doctor who performed the post mortem found that the deceased had suffered fracture of cervical spinal cord and multiple bruises on the forehead. He formed the opinion that the cause of death was due to cardio respiratory arrest secondary to strangulation and intracranial hemorrhage. The postmortem report shows that the deceased was killed.

[12] On re-evaluation of the evidence, we are satisfied, like the trial judge, that the evidence of Hassan, Denis and Issa was credible and

rebutted the appellant's alibi. We are further satisfied that the circumstantial evidence as depicted by the evidence of Hassan, Denis and Issa proved beyond reasonable doubt that it is the appellant who caused the death of the deceased.

[13] In sentencing the appellant to death the learned judge said that the sentence of death was mandatory. In the Supreme Court **Petition No. 15 of 2015 -Francis Karioko Muruatetu & another vs Republic & 5 others**, the Supreme Court declared **section 204** of the Penal Code to be inconsistent with the Constitution and invalid to the extent that it provides for the mandatory death sentence for murder.

The appellant was in custody for nearly five years before he was sentenced on 15th July, 2009. In total he has been in custody for nearly fifteen years. Remitting the case to the High Court for sentence hearing will cause prejudicial delay to the appellant. A sentence of 20 years imprisonment will serve the ends of justice.

For the foregoing reasons, the appeal against conviction is dismissed. The appeal against sentence is allowed to the extent that the sentence of death is set aside and in lieu thereof the appellant is sentenced to twenty years imprisonment with effect from 15th July, 2009.

Dated and delivered at Kisumu this 28th day of March, 2019.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR