IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, WARSAME, & SICHALE JJ.A.)

CRIMINAL APPEAL NO. 115 OF 2013

BETWEEN

P K N.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a ruling of the High Court of Kenya at

Nairobi by Ochieng, J.

in

H.C.CR.A NO. 113 OF 2006)

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JUDGMENT OF THE COURT

The Appellant **P K** was charged with the offence of murder contrary to **section 203** as read with **Section 204** of the Penal Code. The particulars of the offence were that on 3rd September, 2006 at [Particulars Withheld] area Kiserian of the then Kajiado District within Rift Valley Province, murdered **D W P.** The **appellant** appeared before Muga Apondi, J for plea on 11th December, 2006. He pleaded not guilty. Subsequently the trial commenced before Ochieng, J on 19th April 2010. The learned judge recorded the evidence of **J W** a child of tender years who after the court examined her, found that although she did not understand the meaning of an oath, she was able to distinguish between truth and lies. PW1 recalled that on 1st September, 2006 at about midnight, her father, the appellant herein came home and called her mother, the deceased. The appellant had asked her for the keys for the borehole and as she did not know where they were, she informed the appellant as much. She testified that her father found the keys on top of cupboard. According to her ***"My father then opened the borehole. He tied her neck.***

At that time, my mother was speaking, but I cannot recall what she said. ... As dad was dragging mum, I was sitting on my bed. I then walked out of the house. I did not see him throw mum into the borehole. I know he threw her in because he asked me for the keys to the borehole. ...After my dad dragged my mum, I was telling him to leave her alone. He was beating her then." In her further testimony, she told the trial court that on the following day her and her other siblings were taken to her maternal grandmother's place. This was however, after the appellant had asked her not to say where her mother was. PW1 did not heed the appellant's request as she told PW5 and PW3 of what had befallen her mother.

PW2 J N is the brother of PW1. He was 7 years old then. After examining him, the court found that he did not understand the meaning of an oath but he knew the difference between lies and truth and the court directed that he makes an unsworn statement. On that particular night, PW2 heard when the appellant came home. As his mother was being dragged out of the house, he was awake and witnessed the action of his father. He was crying. He told the trial court that his mother initially refused to open the door of the house for their father who knocked several times before, she finally opened. **PW3 C W W** was the deceased's mother. She said that the appellant and deceased used to have domestic problems. The deceased severally left the matrimonial home to take refuge at her place. On 4th September, 2006 she met the appellant at Kiserian who told her that the deceased was missing from home. They each agreed to look for the deceased. On the following day, the appellant brought his three children to her.

PW5 P P P was the deceased's father. He knew of the domestic squabbles between the appellant and the deceased. On 5th September, 2006 he met the appellant at Kiserian who informed him that the deceased was missing from home. As this was a regular feature in the appellant's and deceased's life, he dismissed the report and asked the appellant to go look for the deceased. Upon his return home and on talking to PW1 he got to know what had happened. On the following day, he identified the deceased's body at Kiserian Police Station.

PW 6 H W was the deceased's sister. She was at her parents' home when the appellant took the children there. On 6Th September, 2006 she sought an explanation from PW1 as to why they had been taken to their grandparents' place. PW1 explained to her what had happened in their home.

PW1 SGT AKAH GABABA and **PW8 PC RAPHAEL NZIOKA** then of Kiserian Police Station visited the scene of crime and retrieved the deceased's body.

In his defence the appellant made a sworn statement of defence. He stated that on the fateful day after returning from a meeting, he found that his wife was not at home. He asked PW1 for the keys for the store as he wanted to prepare some food for the children which he did. On the following day, he went to look for his wife and met his mother-in-law PW3 and informed her of the deceased's absence from home. On the following day he took the children to his mother-in-law (PW3). Upon his return home, he found a suicide note in the bible. He took the note to the police. As the note had indicated that the deceased would throw herself into the well, after draining the well they found the deceased's body.

Upon close of defence case, the trial judge rendered a judgment dated 17th October, 2012 and found the appellant guilty of the offence of murder. He was duly convicted. The appellant was dissatisfied with the outcome of the trial and hence this appeal.

During the hearing of the appeal, Mr. Oyalo learned counsel for the appellant urged the grounds in the supplementary memorandum of appeal dated 17th July, 2014. These were:

> **(i) That the trial court was not properly constituted.**
>
> **(ii) The trial court erred in relying on a medical report produced by a person who did not author it.**
>
> **(iii) That there is need to have additional evidence adduced so as to establish the cause of death.**
>
> **(iv) That the evidence of PW1 and PW2 required corroboration as per sections 124 of the Evidence Act.**

Firstly, Mr. Oyalo urged us to find that the trial was conducted without the aid of assessors as per the law obtaining at the time the offence was allegedly committed. He relied on the case of **Kiwelesi v. Republic 1969 EA 227** and **Bernard Kariuki & Others v Republic Criminal appeal No. 433 of 2007** for the proposition that no lawful trial could be held in the absence of assessors.

Secondly, the fact that the medical report was produced by PW8 a police officer who did not know the doctor's handwriting was a mis-direction. Thirdly, that the evidence of **PW1** and **PW2** was that of minors and required corroboration. Fourthly, that no consideration was made of the suicide note referred to by the appellant.

In opposing the appeal, Mr. Kivihya, the Assisstant Director of Public Prosecution pointed out that on 28th January, 2008 Apondi J discharged the assessors **"... following the amendment in the law which allows the High Court to deal with murder cases without their assistance.**" On the issue of the evidence of children of tender years, it was counsel's submission that the trial judge conducted a voire dire examination and he found that the two children were able to distinguish truth from lies and that in any event, the deceased's body was found in the well and this corroborated the evidence of PW1 and PW2.

As regards the suicide note, counsel was of the view that the non-production in court was not prejudicial to the appellant.

The appeal before us is a first appeal. As a first appellate court we are duty bound to analyse and re-evaluate the evidence on record and come to our own independent conclusion. In so doing, we should always bear in mind that we did not have the opportunity, unlike the trial court, of hearing and assessing the demeanour of the witnesses. (see **Okeno v Republic [1972] EA 32.**

Firstly on the issue that the trial was conducted without the aid of assessors, the record shows that on 28th January, 2008 Apondi, J., ordered the **"assessors to be paid allowance for today. However the assessors are hereby discharged from this case following the amendment in the law which allows the High Court to deal with murder cases without their assistance".**

The dispensation of the assessors was in pursuance to the amendments to **section 262** of the CPC that required all murder trials to be held without the aid of assessors by The Statute Law (Miscellaneous Amendment) Act No. 7 of 2007 which was gazetted on 10th October, 2007. There was further provision that the commencement date was 15th October, 2007. In our view, it cannot be that since the commission of the offence was allegedly committed on 11th December, 2006, then the suit had to be conducted with the aid of assessors, since the date the trial commenced on 19th April, 2010 the amendment had done away with the assessors and Apondi, J., had rightly dispensed with the assessors on 28th January, 2008.

The other ground of appeal raised by the appellant was that the evidence of PW1 and PW2 required corroboration. For a start PW1 and PW2 were children of tender years. Section 19 of the defunct Statutory Declarations Act provides that where a child does not understand the nature of an oath he/she can give unsworn statement, if the child knows the difference between the truth and a lie and that the child understands the duty of speaking the truth. The trial judge (Ochieng J.) carried out a voire dire examination of PW1 and PW2. He found that the two did not understand the meaning of an oath. However, the learned judge found that PW 1 and PW2 knew the difference between truth and lies and he ordered that they make unsworn statements of defence. The two testified and told the trial court what had befallen their mother on the fateful night. **S.124** of the Evidence Act (cap 80 of the Laws of Kenya provides that:

> **"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act (Cap 15 where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for the 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."**

PW1 and PW2 gave graphic details of the fateful night. They told the trial court of how their mother was tied and dragged to the well. The appellant had asked PW1 to avail keys to the well. The deceased was found to have been dumped in the well. The trial court found further corroboration in:

> **".... the abrasions which the doctor showed PW5 during the post mortem examination**

corroborate the testimony of both PW1 and PW2 about the fact that the body of the deceased was dragged out of the house after the deceased had been strangled". The trial court further stated:

"The ligative marks across the neck of the deceased are consistent with strangulation. The absence of abnormality in the respiratory system of the deceased, inclusive of the lungs that were intact was consistent with death before the body was dumped into the well. That means that the deceased did not throw herself into the well. She was thrown in."

In our view, there was sufficient corroboration of PW 1 's and PW2's evidence. The post mortem evidence produced and which gave graphic details of how the murder was committed is a clear testimony of corroboration and in consistent with the evidence and circumstances described by PW1 and PW2. In our understanding corroboration is complete and sufficient in the manner the body of the deceased was dragged out of the matrimonial home after being strangled with a rope. We are satisfied that beyond doubt that the medical evidence as contained in the post mortem clearly corroborated or supported the evidence of the two minors who witnessed the conduct and action of the father, who eventually caused the death of the their mother (deceased).

The appellant's other ground of appeal was that the medical report was produced by a person who did not author it. On 27th July, 2011 Ms Macharia for the prosecution applied to have the post mortem report produced by the investigating officer as Dr. Huha who had prepared it was out of the country and the date of his return was unknown. Mr. Gulenywa who appeared for the appellant is on record as having stated:

"As the doctor's return is unknown, perhaps the Investigations Officer may produce the post mortem report."

It was in view of the above conclusion that the trial court proceeded to order the post mortem report be produced by the Investigation Offer. Having so conceded, the appellant cannot now turn around and complain that the post mortem report was not produced by the author.

In conclusion and having re-evaluated the whole evidence, we are satisfied that the evidence produced by the prosecution against the appellant was cogent and clear. We are also satisfied that the trial court committed no misdirection or error in convicting and sentencing the appellant as the case was proved beyond reasonable doubt. We so hold.

We believe we have said enough to show that this appeal is for dismissal. It is hereby dismissed.

Dated and delivered at Nairobi this 28th day of July, 2017.

ALNASHIR VISRAM

…….

JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR