IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MARAGA, WARSAME & G. B. M. KARIUKI, JJ.A)

CRIMINAL APPEAL NO 362 OF 2012

BETWEEN

BENARD KUNGU KARIUKI……..……...APPELLANT

AND

REPUBLIC……...……..RESPONDENT

(being an appeal from the conviction and sentence of

the High Court of Kenya at Nairobi (Ochieng, J.) dated

26th January 2012

in

H.C.Cr. A. 68 of 2008)

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JUDGMENT OF THE COURT

The appellant, ***Benard Kung'u Kariuki***, was charged before the High Court of Kenya at Nairobi on a charge of murder, contrary to section 203 as read with section 204 of the Penal Code, Chapter 63 of the Laws of Kenya. In particular, it was charged that the appellant, on the 19th July 2008, at Ndumberi in Kiambu District within Central Province, murdered ***Denis Ng'ang'a Waithaka***.

The facts so far as are material to this appeal are that on the material day the deceased was at the appellant's house together with ***Lucy Wairimu Ng'ang'a*** (PW1), ***Martin Ngugi*** (PW2) and ***Samuel Kibui*** (PW3), as well as other children.

PW1 testified that she and her sister went to the appellant's house after he called them. The appellant then left and went to check whether his grandmother was in, but he did not find her. When he came back, he took out some medicine which he gave to the deceased, PW2 and PW3. The appellant then told them to go and sleep at PW2's house. When they left the house, the deceased begun to vomit, and he was taken to the hospital by her uncle Kamau. PW2 and PW3 were taken to the hospital as well, and PW1 went to her grandmother's house.

PW2's testimony was that on that fateful morning, he got up and went to the appellant's house. The

appellant then went and told the deceased that the other children were calling him. The appellant sent some of the children away, and told them that their grandmother wanted to send them to buy soap. Four children remained at the appellant's house, that is: the deceased, PW1, PW2 and PW3. The deceased came to the appellant's house with PW1. The appellant then told the children that he would give them some medicine to clear their worms; this medicine, which looked like milk, was drunk by the deceased, PW2 and PW3. The appellant then washed the cups and went away. The deceased then begun to vomit and diarrhoea. PW2 alerted his grandmother who called Mr Kamau (PW4) and the children were rushed to the hospital, where the deceased died.

PW3 is the appellant's son. His testimony was that he and some other children were at their home when the appellant went behind the house and put some medicine in three cups. He then stirred the medicine and told him, PW2 and the deceased to drink the medicine as it was for worms. After the three had drunk the medicine, the appellant washed the cups and then took them to PW2's house. The appellant also told the children to go and sleep in PW2's house and then left for Ndumberi. After taking the medicine, the deceased begun to vomit and diarrhoea. PW4 came and took the deceased to the Kiambu District Hospital, and later on, some other people came and took PW2 and PW3 to the hospital.

Eluid Kamau Ng'ang'a, (PW4), on the fateful morning heard the appellant call out to the deceased. He had been asleep in his house, as he had come from an overnight vigil. At about 10:00 am, PW4 was awoken by screams. The screams caused him to rush out of the house, where he found the deceased lying on the ground and salivating from the mouth. Around this time, PW2 also informed ***Margaret Njeri*** (PW7) of the incident, who rushed to the scene to find that the deceased, along with the other two children, were on the ground and were vomiting. PW4 rushed the children to the Kiambu District Hospital, and the deceased passed on while he was undergoing treatment.

Dr Peter Muriuki Ndegwa (PW8) is the pathologist who conducted the post mortem examination on the deceased. PW8 observed that the body had no physical injuries and so he suspected that the deceased had been poisoned. He obtained specimens of the stomach and its contents, blood and kidney samples and a liver biopsy from the body. These samples were sent to the Government Chemist for a full toxicology. He received a full report on 27th August 2008. The examination results showed that the specimens contained the pesticide Diazinol, and an acaricide, Amitraz or Triatix, both of which if ingested by humans, were poisonous. From the test results, PW8 concluded that the cause of death was chemical poisoning due to the Diazinol and Amitrax.

The matter was investigated by ***PC Erastus Matwanga*** (PW9) who on the fateful day received information from some members of the public that the appellant had administered to the deceased a substance that was for deworming, but turned out to be poisonous. PW9 went to the Kiambu District Hospital where he found that one of the children, the deceased, had died. PW9, along with the mother of the deceased and other members of the public, went to the appellant's house, but they failed to recover anything that could be used as an exhibit. PW9 later then interviewed the surviving children, who told him that the appellant had given them some deworming medicine. PW2 and PW3 also confirmed that they had been given the medicine alongside the deceased Denis. This evidence was also reiterated by

PW1 who testified that the appellant gave the deceased, PW3 and PW4 some medicine to drink.

That is a summary of the entire evidence that was adduced by the prosecution. The trial court formed the opinion that there was enough evidence that warranted the placing of the appellant on his defence. The appellant therefore gave an unsworn statement in which he denied the charge and put up a defence of alibi. He testified that on the material night, he was at his place of work from 7:30am. He worked until 10:30 am when he learnt of the incident, and that is what prompted him to go to the hospital. He sat in the waiting room of the hospital until the doctor came out and told them that one of the children had passed away.

Johnson Njuguna Kiruri (DW2) on his part testified that on the material day, he was working as

foreman at a construction site. He met the appellant on the site at about 7:30 am. DW2 did leave the site for a short period of time. At about 10:00 am, he heard people saying that there were 3 children who had been taken to hospital after having drunk poison. He realised that two of the children were from the home of the appellant, so he told the appellant, and released him to go home to check on the matter.

The trial judge evaluated and considered the whole evidence by the prosecution and the defence and concluded that the prosecution had proved its case beyond a reasonable doubt. In particular, the judge had this to say:

> ***"… After analysing all the evidence on record, I note that PW2 [is] a nephew to the accused, whilst PW3 [is] a son to the accused. They lived within the same village, and associated very closely. Therefore, there was absolutely no room whatsoever of mistaken identification, indeed, this was a case of recognition. Three young children all saw the accused as he gave to the deceased and also to PW2 and PW3 some medicine."***

It is based on this evidence that the trial court found the appellant guilty of murder, contrary to section 203 as read with 204 of the Penal code, convicted him and sentenced him to suffer death as provided in law.

The appellant now comes before us. As this is a first appeal, we remind ourselves that we are under a duty to reapprise the evidence tendered before the trial court, and make our own independent conclusion, but bear in mind that we have neither seen nor heard the witnesses, and make due allowance for that. This is the duty of the first appellate court as spelt out in ***Okeno v Republic [1972] EA 32*** where it was held by this

Court that:

> ***"It is the duty of a first appellate court to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgement of the trial court should be upheld."***

See also the decision of this Court in ***Josiah Afuna Angulu v Republic [2010] eKLR(Criminal Appeal No. 277 of 2006)*** where the Court held that:

> ***"… it is our duty as the first appellate court to reassess and reevaluate such evidence and to reach our own independent conclusion in the matter."***

To sustain a charge of murder, it is essential for the prosecution to show that the accused person, with malice aforethought, caused the death of another person, by an unlawful act or omission.

Having evaluated the evidence tendered by the prosecution, it is clear that the deceased died of chemical poisoning. According to the report from the Government Chemist and the examination conducted by PW8, there was Diazinol and Amitrax in the body of the deceased. These are chemicals used in pest control and which are poisonous to human beings if ingested. The cause of death is therefore chemical poisoning as a result of the consumption of the Diazinol and Amitrax. This is borne out of the evidence of PW8, as well as the post mortem report produced in court.

The question that remains to be answered is the source of the said chemical poison. Is there evidence that the deceased may have consumed chemicals left by his mother or any other party? There is no doubt that the scene of the crime was the house of the appellant. Again, there is ample and uncontroverted evidence there were about 8 children within the homestead of the appellant. It is also undisputed that some of the children did not consume the said poison because they were sent away by the appellant.

One important point which must be addressed in determining whether it is the appellant who administered the poison is the evidence of his son, PW3, who stated that on the morning of 19th July

2008 the appellant went to call the deceased. When the deceased came, they were putting up cloths onto the seats at the appellant's home. The deceased arrived with PW1, his sister. The appellant then told them that he wanted to give them medicine to clear their worms. He gave this medicine to the deceased, PW2 and PW3. After that, the appellant went and washed the cups. After ingesting the medicine, the deceased begun to vomit and diarrhoea. This evidence remained consistent even after cross examination. The evidence of PW1 and PW3 was similar. That the appellant gave the children some medicine to drink, on the pretext that it would clear out their worms. Afterwards, he washed the cups and took them to another house.

Mr Njanja, counsel for the appellant, relied on his supplementary memorandum of appeal lodged in this Court on the 23rd May 2014. The first ground brought by learned counsel was that the trial court erred in relying on the uncorroborated and contradictory evidence of PW1, PW2 and PW3. In particular, counsel urged that this uncorroborated evidence was contradictory because PW1 stated that the cups that were used to administer the poison were blue, pink and colourless, whereas PW3 stated that the cups used were blue and green. Counsel further considers this a failure because the trial court did not warn itself as to whether these contradictions could raise reasonable doubt. On the uncorroborated evidence, Mr Njanja faulted the evidence as it ought not have been accepted in line with section 124 of the Evidence Act.

Mr Njanja also took issue with the *voire dire* examination, terming it as very scant, and submitted to us that the court ought to have done more in determining whether the minor children had sufficient intelligence. Counsel submitted that the lack of adherence to section 19 of the Oaths and Declarations Act, as well as the violation of section 124 of the Evidence Act is fatal.

Mr Monda, opposing the appeal on behalf of the state, agreed that the evidence of the minors required corroboration, but that this corroboration was found in the evidence of PW4, whose testimony was that he heard the voice of the appellant as he called the deceased to his house. In addition, there was further corroboration in the post mortem report and in the evidence of PW8 who stated that the deceased died as a result of chemical poisoning. It was therefore not coincidental that immediately the poison was administered that death occurred.

The relevant portion of Section 124 of the Evidence Act, which requires the corroboration of evidence of minors in criminal cases provides as follows

> ***"124. Notwithstanding the provisions of the Oaths and Statutory Declarations Act, where the evidence of a child of tender years is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted unless it is corroborated by other material evidence in support thereof implicating him."***

In the present appeal, PW1 was nine years old at the time she testified. PW2 was eleven years old and PW3 was twelve years old. A *voiredire* examination, in accordance with section 19 of the Oaths and statutory Declarations Act was conducted. In Mr Njanja's view, the *voire dire* examination was not sufficient. The nature of a *voire dire* examination was discussed by this Court in ***Mohammed v Republic[2005] 2 KLR***

138where it was held that

> ***"… in conducting a voire dire, section 9(1) requires of the court to establish two matters, firstly, whether the child understands the nature of an oath.***
>
> ***If the court comes to that conclusion, then it proceeds straight away to swear or affirm the child and to record the evidence. Secondly, if the court is not satisfied on the first test, it should express its opinion not only that the child is possessed of sufficient intelligence to justify reception of the evidence, but also understands the duty of telling the truth, before proceeding to record the child's evidence."***

The fact that the evidence of the three children was unsworn does not in our mind render it valueless. The said evidence was admissible and credible.The trial court made a conscious decision to have the unsworn evidence of the three children. This decision was arrived at after the trial court thoroughly examined the three children and formed the opinion that the children did not comprehend the meaning of an oath in compliance with section 19 of the Oaths and Statutory Declarations Act. The duty of the trial court is to inquire whether the child understands the nature of an oath or whether the child possesses sufficient intelligence to justify reception of the evidence. The trial court conducted a *voire dire* examination and found that the children were fit to give unsworn testimony. The trial court here discharged its duty successfully, and cannot be faulted.

It is a settled principle of law that where a child of tender years gives unsworn testimony, then that evidence ought to be corroborated before the trial court can rely on it to sustain a conviction.

After conducting a *voire dire* examination, then the court must proceed in terms of section 124 of the Evidence Act. See the further holding of the Court in ***Mohammed v Republic (supra)*** where it was held that:

> ***"Whatever the finding made in the course of the voire dire under section 19, the Court was required to proceed to direct itself in accordance with section 124 of the Evidence Act … meaning that the Court had to seek corroboration of the child's evidence."***

This is embodied not only in the Evidence Act, but also in a long line of authorities of this Court, such as in ***John Otieno Oloo v Republic [2009] eKLR (Criminal Appeal 350 of 2008)*** where this Court stated that:

> ***"… Evidence of a child of tender years not given on oath must in law be corroborated."***

It therefore follows that the evidence of PW1, PW2 and PW3, because it was by minor children required corroboration, and we find that the evidence was corroborated. The fact that PW4 heard the appellant call out to the deceased to go into his house corroborates the children's testimony that they went into the appellant's house that morning. This voice identification of the appellant is acceptable because PW4 knew the appellant well, and therefore knew his voice well. Evidence of voice identification is admissible.

In ***Libambula v Republic [2003] KLR 683*** the Court of Appeal held, regarding voice identification that:

> ***"Evidence of voice identification is receivable and admissible in evidence and it can be depending on the circumstances carry as much weight as visual identification…. In receiving such evidence, care would be necessary to ensure that it was the accused person's voice the witness was familiar with it, recognized it and that the conditions obtaining at the time were such that there was no mistake in testifying to that which was said and who said it"***

We therefore have no doubt that the appellant was correctly placed as being the one who called the deceased to go to his house.

The evidence of poisoning of the children is also corroborated by the medical evidence, adduced by PW8, as well as the post mortem report that he produced in evidence. This evidence was to the effect that the cause of death was due to chemical poisoning.

Even if we are wrong on this score, we find that the circumstantial evidence linking the appellant to the commission of the crime was overwhelming. In ***James Mwangi v Republic [1983] KLR 327***, this Court held:

> ***"In a case depending on circumstantial evidence, in order to justify the inference of guilt, the***

incriminating facts must be incompatible with the innocence of the accused, the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of guilt. In order to draw the inference of the accused's guilt from circumstantial evidence, there must be no other coexisting circumstances which would weaken or destroy the inference."

As we have stated, it is clear that the children were in the home of the appellant, and shortly after they left his house, they were outside, ill, having gotten sick from whatever it was that they ingested at the appellant's house. It is also apparent that the deceased died of chemical poisoning. The irresistible conclusion arising out of these facts is that the children ingested something while they were at the appellant's house, and whatever it is they ingested is what caused their illness, and the death of the deceased child.

Mr Njanja took issue with the investigations that were conducted. He submitted to us that the investigation by PW9 did not reveal anything. In addition, he questioned the absence of the appellant's wife from the proceedings. Counsel submitted that the inference to be made here is that had the appellant's wife given evidence, it would have been contrary to the prosecution's version of events. He further submitted that this onus remained on the prosecution to call her, as the appellant couldn't do so because she left their home. There is no merit in this assertion. Section 143 of the Evidence Act provides that ***"no particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."***

That notwithstanding, the only thing that was necessary for the prosecution to prove was that the appellant is the one who administered the poison that killed the deceased, and as we have stated above, there is clear evidence that links the appellant to being the one who administered the poison.

The evidence of PW1, PW2 and PW3, together with that of PW4 and PW8, bears us no doubt that the appellant was the one who brought a poisonous concoction and administered it to the three boys, resulting in the fatal and inevitable death of the deceased. He was indeed at the scene of the crime on the material day and time, and fled after completing his heinous act of giving the three boys what was allegedly said to be deworming medicine but was a dangerous poison that was wrapped, concealed and made out as medicine. The boys started vomiting immediately after ingesting the medicine that was allegedly given by the appellant. That is the position as confirmed by PW1, PW2 and PW3.

The direct evidence of PW1, PW2, PW3 and PW4, together with the circumstances surrounding the death of the deceased, a few hours after the ingestion of an alleged deworming medicine given to him by the appellant, as pointed out by the postmortem report and the report from the government chemist which analysed the samples and the organs of the deceased, all point irresistibly to the conclusion that the appellant had the occasion and the opportunity to cause the death of the deceased intentionally and without any basis.

In our view, malice aforethought was proved; the appellant formed the intention to cause the death, or grievous harm at the point when he prepared and brought the dangerous pesticides to be taken by the children on the pretext that he was giving them deworming medicine. Therefore there is no doubt in our mind that the death was intended, and that malice aforethought was present the moment that the appellant administered the alleged deworming medicine on the three children. The inevitable outcome was the death of one of the children. With God's grace, two survived the ordeal. As fate would have it, the remaining and lucky two who survived told the graphic and chilling story as honestly and clearly as it happened.

The appellant gave an alibi defence. He said that at the time of the commission of the crime, he was not at the scene of the crime. It is true, as the appellant's counsel contends that the burden of proving that the defence of alibi was false fell squarely on the shoulders of the prosecution.

See ***Karanja v Republic [1983] KLR 501.***

See also ***Anthony Kinyanjui Kimani v Republic [2011] eKLR (Criminal Appeal No. 157 of 2007)***where this Court stated that:

> ***"It is indeed the law that there is no burden cast on an accused person to prove his alibi …. The prosecution has the burden throughout of negating the alibi."***

The evidence on record, by the testimony of PW4, places the appellant as calling out to the deceased on the material day at about 9:00 am. Although the appellant raised an alibi and stated that he was not at the scene, and that he had already reported to work, the evidence of the prosecution was credible and consistent, and showed that he was indeed at the scene of the crime, and that he was the one who administered the poisonous chemicals to the deceased, PW2 and PW3.

It is also noteworthy that DW2 could not corroborate the appellant's alibi since DW2 admitted that after some time, he left the construction site. It is therefore clear to us that the defence of alibi was displaced by the prosecution.Consequently, the case against the appellant was proved beyond a reasonable doubt.

The result of our findings is that the conviction of the appellant was based on sound and credible evidence. This appeal is therefore devoid of merit and it is hereby dismissed.

Dated and delivered at Nairobi this 18th day of July, 2014

D. K. MARAGA

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

G. B. M. KARIUKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

mwk.