REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAKURU

(CORAM: O'KUBASU, GITHINJI & VISRAM, JJ.A)

CRIMINAL APPEAL NO. 12 OF 2009

BETWEEN

V.C.R ……..……. APPELLANT

AND

REPUBLIC …… RESPONDENT

(*An appeal from a conviction and sentence of the High Court of Kenya at Kericho (Ang'awa, J) dated 2nd February, 2009*

In

H.C Cr. C. No. 30 'B' of 2007)
****

JUDGMENT OF THE COURT

The appellant herein, V.C.R was arraigned before the High Court of Kenya at Kericho on a charge of murder contrary to ***section 203*** as read with ***section 204*** of the Penal Code. The particulars of the offence were as follows:

It was alleged that on 3rd day of November, 2007 at K[....] in Kericho District within Rift Valley, the appellant murdered WINNY CHEPKOECH.

The appellant pleaded not guilty when the charge was read and explained to him on 5th December, 2007 by Musinga, J. but his trial commenced on 20th November, 2008 before Ang'awa, J. The prosecution called thirteen witnesses to testify. The learned Judge considered the evidence by the prosecution and the defence put forth by the appellant and came to the conclusion that the appellant was guilty as charged. In concluding her judgment delivered at Kericho on 8th December, 2008, the learned Judge said:-

"24. From the case before court, the deceased witnesses and the subject are related and know each other well. The subject was a first cousin to the deceased and this allegation that he could not have committed such act.

25. The subject's conduct of disappearing during the first search clearly shows that he indeed had the knowledge of what occurred to the deceased. His confession to a magistrate was without duress nor was he forced in anyway to actually give the said confession.

26. I would agree that the confession is an explanation of what occurred that the subject did strangle the deceased to stop her screaming.

27. Even if perchance the confession was not a factor to this trial, the subject was the last known person to then be seen with the said deceased.

28. I do not believe his story that he was in his homestead. He had disappeared for three days without explanation.
29. I find in this murder trial that there was a death of the deceased that occurred. That this death was as a result of the unlawful act of the subject who strangled the deceased to death, thus causing her death. That the subject had malice aforethought, namely to court an unlawful act leading to the deceased death.

30. I find the subject having murdered deceased guilty, but because he is a minor the children's act (so declares him a minor if under 18 years old). Does not permit me to commit the subject but merely declare that he is guilty of the offence. I so pronounce the subject guilty

of the offence of murder."

As the learned Judge was satisfied that at the time the appellant committed the offence he was a minor she called for a probation officer's report which report was presented to her on 2nd February, 2009. The record shows that after perusing the probation officer's report the learned Judge proceeded to sentence the appellant as follows:-

"I wish to point out that the subject was 17 years of age at time offence was committed. He has been remorseful with himself. He was responsible as headlong we wish to. I ask he be given facilities to pursue education. He is a first offender and has no previous convictions court sentence. The minor was aged 17 years when offence was committed. He is now 20 years old and too old for probation placement or Bostal placement. He is found to be unsuitable to go back home. I hereby sentence the minor to life imprisonment (as he has attained the age of majority)"

It is the foregoing that triggered this appeal.

When the appeal came up for hearing on 10th January, 2012, Mr. A.O. Muchela appeared for the appellant while Mr. A.J. Omutelema (Senior Principal State Counsel), appeared for the State. Mr. Muchela relied on the following grounds in urging the appeal:-

"1. THAT the learned trial Judge erred in conducting the proceedings contrary to the provisions of the Children Act no. 8 of 2001 with regard to the period in which the appellant was to be held in remand.

2. THAT the learned trial Judge erred in conducting the proceedings contrary to the provisions of the Children Act no. 8 of 2001 with regard to the period in which the trial was to be concluded.

3. THAT the learned Judge erred in relying on a confession that was improperly taken."

In his submissions, Mr. Muchela pointed out that the learned Judge had heavily relied on confession taken by the Magistrate which confession the appellant challenged . It was Mr. Muchela's view that the confession fell short of the requirement of the law as it was contrary to ***section 194*** of the Children Act of 2001.

Mr. Muchela further submitted that the only direct evidence against the appellant was that of PW1 who was a minor and that the other evidence was circumstantial in that the appellant disappeared for three days. Finally, Mr. Muchela submitted that as the appellant was a minor at the time the offence was committed, he should have been held at the President's pleasure.

Mr. Omutelema on his part submitted that there was sufficient evidence against the appellant only that as regards the sentence, he (Mr. Omutelema) conceded that the appellant should have been dealt with pursuant to ***section 25*** of the Penal Code.

As this is a first appeal, it is our duty to re-evaluate and analyze the evidence and make our own independent conclusion on that evidence – see **OKENO V. R [1972] E.A. 32**.

It was the evidence of the young girl, Judith Chepkorir (PW1) that she saw the appellant follow the deceased into the bush and it was after the deceased disappeared and her body discovered that the appellant also disappeared from home. But even more crucial in this case was the evidence of Daisy Toigot (PW9) who was then a Resident Magistrate at Kericho. It was her evidence that she recorded a confession from the appellant.

We have carefully analyzed and re-evaluated the evidence before the trial court and it is our finding that the appellant's conviction by the trial court was based on the evidence of PW1 and PW9. It has emerged that PW1 saw the appellant and the deceased walking away and soon thereafter the appellant had disappeared from the scene and the body of the deceased recovered. There was then the confession by the appellant as recorded by PW9.

In his defence the appellant denied having committed the offence but said that he had been arrested on allegation that he had raped the deceased.
Taking into account the evidence of prosecution witnesses and what the appellant said in his defence, we are satisfied that there was sufficient evidence to show that the appellant was seen with the deceased and soon thereafter the deceased was found dead and the appellant disappeared for three days. In view of the foregoing, we are satisfied that both direct evidence and circumstantial evidence point to no other conclusion than that it was the appellant who caused the death of the deceased. We would therefore uphold the learned Judge on finding the appellant guilty as charged.

As regards sentence, we are in entire agreement with both Mr. Muchela and Mr. Omutelema that the appellant ought to have been dealt with pursuant to ***section 25*** of the Penal Code.

For the foregoing reasons, we dismiss the appeal against conviction but set aside the sentence of life imprisonment and substitute it with an order that the appellant shall be detained at the pleasure of the President. It is so ordered.

Dated and delivered at Nakuru this 23rd day of February, 2012.

E.O. O'KUBASU

…….
JUDGE OF APPEAL

E.M. GITHINJI
……..
JUDGE OF APPEAL

ALNASHIR VISRAM
…….
JUDGE OF APPEAL

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

DEPUTY REGISTRAR.