



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT KISUMU
CRIMINAL APPEAL 236 OF 2006

BETWEEN

P.O.O.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kisumu (Mango, J.) dated 16th March, 1993)

In

H.C.CR.C. NO. 8 OF 1992

JUDGMENT OF THE COURT

Following his committal to the High Court by the Chief Magistrate's Court at Kisumu, for trial for the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code, **P.O**, the appellant, was on 17th November, 1992, arraigned before Khamoni, J., for that offence. Upon pleading not guilty to the charge, the appellant was later tried with the aid of assessors. As the law stood then, three persons were chosen to serve as assessors. After four witnesses had testified, the Court made a note on the record as follows:-

"Court:-

The trial will continue with the two present assessors. Notice to show came to issue to Mr. Ogeno to show cause on 18th February, 1993."

Mr. Ogeno or Ogendo was one of the three assessors. There is no note on record whether he ever appeared to show cause. It is not clear what he had done which made it necessary for the Court to order that he appears to show cause. We opine that he had failed to attend court for the further hearing of the appellant's case. Be that as it may, the trial continued with only two assessors. Four more witnesses for the prosecution testified after which the appellant was put on his defence. He made a statutory statement and called no witnesses.

The prosecution case was mainly based on the unsworn testimony of a twelve year old girl, a retracted confession of the appellant and medical evidence. **R.A.O**, (PW1), the younger sister of the appellant, was on 28th September, 1991, in the evening with **A.A.O**, the deceased, who was her mother when the appellant appeared. It was PW1's evidence that the deceased was in her kitchen making meals. The appellant appeared to be in a foul mood, and on arrival demanded some water for a bath. PW1 gave him

some in a pail, but the appellant did not think it was enough. PW1 gave him some more after which he left, but returned after a short time armed with a club and a hoe. He went straight to where the deceased was and landed a blow on the back of her neck with the hoe. The deceased fell down by the fireplace bleeding from her nose. The appellant, according to PW1, appeared to have been incensed by the fact that the deceased had invited some men to come to her house for prayers against his will.

At the material time there were only the deceased, PW1, and the appellant in that home. So only PW1 witnessed the assault. She was alarmed, and ran away to go and report the matter to one, **Z.O**, whom she described as her father. Evidence was adduced to the effect that the deceased's husband had died some time earlier, and the said Z.O, who was her deceased husband's brother, inherited her, in accordance with Luo Customary Law. **Z.O.A** (PW2) had his own home and family. When he received the report of the assault on the deceased, he did not immediately proceed there. Instead he informed his two sons, but they too, did not take any step that night on the pretext that it was dark. On the next morning when they went to the deceased's house, they found her lying by the fire place of her kitchen, dead, with blood oozing from her nostrils. The appellant was in the home and when **William Okoth Motto** (PW3), the Assistant Chief of the area, tried to arrest him, the appellant brandished a panga at him and other people who gathered there, threatening them with death if they did not leave the home. The appellant later locked himself in his house, and when the Assistant Chief returned with police officers, he refused to open for them. They had to break in to gain access into his house to facilitate his arrest.

A quick search in the house led to the recovery of a slasher, cannabi sativa and a bloodstained cap. The appellant was taken away and so was the body of the deceased. A post mortem examination of it by **Dr. Mark Owuor** (PW7) revealed a cut on the right temporal area of the skull, a blunt wound on the head and burnt brain. The cause of death was hemorrhagic shock. The appellant too was medically examined by the same doctor. He was found to be mentally and physically fit and there were no visible injuries over his body.

While the appellant was still in police custody, he is alleged to have made a statement under inquiry, in which he made a clean breast of the offence. As material, this is what the appellant stated in that statement:-

“I do recall that on the 28th September, 1991 I return (sic) home in the evening after doing some work of charcoal burning in my farm. When I arrived home I was very tired and I went to my mother's house and requested her to give me some water so as I could take a bath.

My mother told me that there was no water in the house for me to take bath. I again asked my mother how come there was no water in the house yet there is my younger sister who could have fetched water. My mother did not reply my question she just kept quiet. I then told my mother that I still maintain that I want water for a bath and that should be before supper.

I then went back to the house and stayed there waiting for the water. After about twenty minutes in the house I went back to my mother's house to ask for water. My mother insisted that there was no water. At that point, I got annoyed and slapped my mother twice and she fell down after falling down I stepped on her head using my feet repeatedly and also on the mother. I even injured my right foot in the course of stepping her on the mouth. I left her lying down unconscious and went back to my house. The time was about 8:00 p.m. I stayed in the house for some time and went back to check on my mother. When I reached her house, I found that she was not breathing and she was actually dead.

I then moved her body near the fire place and put her head on fire and head got burnt. After that I moved her a little bit away from fire and left the body in the house and I went back to my house and slept till the morning following day.”

As stated earlier in this judgment, the appellant denied at the trial having made that statement, but the statement was admitted in evidence after a trial within a trial.

In his defence, the appellant's story was different. He arrived home from a nearby forest where he had

gone to burn charcoal, but he did not find the deceased at home. He took a bath, went to his mother's kitchen and ate some food which had been left there for him and went to his house and slept. He was later called by his sister, A, who told him that his mother, the deceased herein, had fallen into the fire and that in addition to burns on the right side of her head, she was bleeding from the mouth and nose. He went there and confirmed the report. He then dispatched A to go and notify "Our father Z" (PW2).

When the case was summed up to the assessors, they returned a finding of not guilty on the basis that the appellant having been found to be a bhang addict, he could be said to have been in a confused state of mind to form the necessary intent to kill the deceased. It is not clear how the two assessors came to the conclusion that he was a bhang addict. The only evidence which would suggest that he could have been a bhang smoker, is the discovery of some *cannabis sativa* in his house at the time of his arrest. The doctor who examined him merely noted that the appellant had a history of drug abuse.

Be that as it may, the trial judge (Mango, J.) like the assessors mistakenly believed the doctor made a finding that the appellant upon medical examinations showed evidence of drug abuse. In the end the learned judge did not agree with the assessors on the ground that the evidence revealed a case of murder. He accordingly found him guilty of murder, convicted and sentenced him for the offence. The appellant was aggrieved and hence this appeal.

Eight grounds have been proffered for challenging the appellant's conviction, but when the appeal came up for hearing, Mr. Oyuko, for the appellant, basically argued five. Firstly, that the conviction of the appellant was improperly based on contradictory evidence. Secondly, that the appellant's defence was peremptorily rejected without proper basis. Thirdly, that the appellant's statement under inquiry was improperly admitted and relied upon, without corroboration, contrary to **Sections 25A and 29 of the Evidence Act, Cap 80** of the Laws of Kenya. Fourthly, that the learned trial Judge failed to consider the effect of drugs abuse on the issue of malice aforethought. Lastly, that the learned trial judge improperly ignored the finding of the assessors.

In his judgment, the learned trial judge believed PW1 and looked for and found corroboration in the conduct of the appellant both before and after the death of the deceased, the appellant's statement under inquiry and the post mortem report which confirmed that the deceased had a cut wound at the back of her head.

This is a first appeal. We are obliged to re-evaluate the evidence and come to our own conclusions on the material evidence on record without overlooking the conclusions of the trial court. We must also give allowance to the fact that we, unlike the trial court, did not see or hear witnesses testify as to appropriately assess their credibility. [See **OKENO V. R.** 1972 E.A.32].

Determination of this appeal largely depends on the evidence of PW1, who the trial court treated as a child of tender age. She was aged twelve years on the date she testified. She was cross-examined by the appellant's counsel, one Aroka, and intelligently answered all questions which were put to her. Her account of the events of the fateful day when her mother was hacked to death was clear and consistent. She remembered that the relationship between the deceased and the appellant before the material date was not good. For some reason, the appellant did not want some church men to come to his home for prayers.

The law on the testimony of children of tender age is settled. The child's evidence does not as a matter of law need corroboration where such evidence is given on oath or affirmation. In **Kibangeny Arap Kolil v. R.** [1959] EA 92, the Court of Appeal rendered itself thus:-

"But even where the evidence of a child of tender years is sworn (or affirmed) then although there is no necessity of its corroboration as a matter of law, a Court ought not to convict upon it if uncorroborated, without warning itself and the assessors (if any) of the danger of so doing."

It is clear that as a matter of practice, the sworn evidence of a child of tender years needs corroboration. However, the evidence of PW1 was neither given on oath nor affirmation. She was

however, cross-examined as earlier as stated. What is the position in law in such a case? Again in ***Kibangeny's case*** (supra) the court, as material stated as follows regarding the provisions of **section 19** of the *Oaths and Statutory Declaration Act* then **Cap 20**, but now Cap 15):-

“Section 19(1) provides, as we have seen, that where such a child does not in the opinion of the Court understand the nature of an oath his evidence may be received unsworn if the Court is satisfied of his intelligence and that he understands the duty of speaking the truth. This necessarily, implies that before the child can be allowed to give evidence upon oath (or affirmation) the court must satisfy itself that he does understand the nature of an oath.”

It is quite clear that the unsworn evidence of a child of tender age is receivable, provided that the court is satisfied, firstly, that the child is possessed of sufficient intelligence and secondly, that he understands the duty of telling the truth. What is not settled is whether such a child should or should not be cross-examined. However, we have no doubt in our minds that whether or not such evidence is given on oath or affirmation or unsworn, in practice, such evidence needs to be corroborated in material particulars before a conviction can be based on it. The learned trial Judge did look for corroboration and acted on PW1's evidence to convict the appellant. With respect, we agree with him, and on the basis of PW1's evidence, the evidence of her father (PW2) and the Assistant Chief clearly give a clear picture of the appellant's action. He confronted his mother (the deceased) and on the pretext that she had refused to give him water for a bath, hacked her mercilessly and caused her death. He armed himself before approaching her implying that his action was premeditated. Later, he armed himself and attacked the people who came to the home to find out what had happened. He resisted arrest and later locked himself up in his house and was ready to attack whoever tried to arrest him.

An issue was raised regarding abuse of drugs by him. We earlier stated that an unspecified quantity of cannabis sativa was found in his house. The doctor who examined him noted on a P3 form on the part dealing with General Medical History, thus:-

“Assaulted mother who died following the history of drug-abuse alcohol and Bhang – Cannabis Sativa”

Those remarks were not made following any medical examination, but possibly from accounts given either by the appellant himself or members of his family. The appellant's advocate, Mr. Oyuko, in his submissions before us, stated that the learned trial judge did not consider the effect drugs had on the appellant with regard to ***Mens rea***.

The learned judge in actual fact made mention of the fact that the appellant was a drug taker but he ruled out the possibility that the appellant's action was in any way influenced by drugs. His view was that the appellant having not raised it as a defence, it was not a matter which would affect his guilt. Besides, he said, had the appellant raised it, the burden would have squarely fallen on him to prove on a balance of probabilities, drunkenness, which would exonerate him from guilt.

Section 13(a) of the Penal code does provide that in certain instances the court is obliged to consider whether any drunkenness as a result of alcohol or drug consumption, although not of such a nature as would constitute a defence, could be taken into account in considering whether or not the specific intention to commit a particular offence had been formed. We suppose Mr. Oyuko had that provision in mind.

We earlier stated that the appellant's conduct both before and after the assault of the deceased clearly showed he had premeditated the assault. Evidence was adduced by PW1 that the appellant's hostility towards the deceased, started earlier than the material day of the fatal assault. According to PW1, he had earlier expressed his disapproval about church men coming to his home for prayers. The violence was directed at the deceased, and not PW1. The appellant's mind was clear as to who he was against, suggesting that he did not act on whims. He knew what he wanted and he knew it was wrong. Hence his action in chasing away people who either came to his home to empathize with the family or who wanted to arrest him.

As regards the appellant's defence, Mr. Oyoko submitted that the learned trial judge did not adequately consider it. The appellant's defence was that the deceased accidentally fell into the fire at her kitchen as a result of which she was injured and got burnt on her head. The defence is not only preposterous, but also clearly concocted. There was no indication that the deceased was in any way medically unwell. If she fell into the fire, there is no plausible explanation as to why she could not pull herself out of the fire. Besides, according to the post mortem report, it states that the deceased burned up to her brain on one side of the head, suggesting that when she was burning she remained in one position. The post mortem report on that aspect is more consistent with the appellant's statement under inquiry than an accident. In our view the appellant's defence was properly rejected by the trial Judge.

Finally, Mr. Oyuko complained that the learned trial Judge improperly rejected the assessors opinion. We think, that, in view of what we have stated above, the assessors' opinion was more consistent with their sympathy for the appellant, than influenced by the evidence on record.

We have said enough to show that this appeal is for dismissal. The appellant mercilessly and violently assaulted his own mother, and inflicted fatal injuries on her leading to her death. He was properly convicted for the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code. His appeal fails and is accordingly dismissed. Order accordingly.

Dated and delivered at Kisumu this 22nd day of March, 2012.

S.E.O. BOSIRE

.....
JUDGE OF APPEAL

J.W. ONYANGO OTIENO

.....
JUDGE OF APPEAL

J.G. NYAMU

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR