REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NYERI

CRIMINAL APPEAL 93 OF 2010

LUCAS MBUGUA NDUNGU .....…… APPELLANT

AND

REPUBLIC …….....…….....……..... RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nyeri (Sergon, J) dated 23rd April, 2010

in

H.C.Cr.C. NO. 35 OF 2007)
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JUDGMENT OF THE COURT

On 5th August, 2007, ***JANE NJOKI*** (PW1) left her two minor children aged about four and five years old playing by her mother-in-law's house and went to a posho mill at Mogomoni. Jane returned at about 7pm and went on to prepare for supper. One of the children, L.M. came home and at first, Jane thought the other child M.W. (deceased) who was at the time aged about four years, was still at the mother-in-law's house. After preparing the food Jane called the deceased but the deceased was not with the mother-in-law.

Jane, in the company of her mother-in-law, Peter Muiruri (PW2) AND Joel Njoroge, unsuccessfully searched for the deceased way past midnight. The search team for the whereabouts of the deceased continued the following day when they met a young girl by the name T.W.K. (PW3). T informed the search team that the previous day at about 6pm while she was on the way to buy paraffin, she met the appellant ***Lucas Mbugua Ndungu*** with three children. T identified appellant as a person well known to her as he used to be an employee of Nancy Wangui, a neighbour.

According to T, the appellant was dishing out to the three children, namely, M, W and M sweets. He gave M and M sweets but requested the deceased to accompany him to the shops so that he would buy for her sweets. T saw the appellant carry the deceased on his shoulders and that was the last time the deceased was seen alive. On this morning of 6th August, 2007, T met with PW2 and others who were searching for

the deceased and she informed them that she had seen the appellant carry away the deceased the previous evening.

T in the company of the search team proceeded to the house where the appellant used to stay and she identified him. The search team started questioning and beating the appellant while demanding that he should produce the deceased. Meanwhile at about the same time on 6th August, 2007, at about 7.30am, L.W.M. (PW4) had gone to look for vegetables when she saw the body of the deceased. At first she thought the deceased was sleeping but after calling her three times without a response, she ran to the deceased mother's house to give her the information. L.W.M found no one in the deceased mother's house but she finally caught up with Jane who was in the company of four other people.

L. informed the search team where she had found the deceased body near the church as she was picking vegetables. At the time Jane started screaming and broke down. L. took the other members of the search team to the place where the body was. As they were viewing the body a crowd of people arrived with the appellant. They were beating him asking him to show them where he had taken the deceased. Peter Muiruri Mwenje (PW2) a brother-in-law of Jane participated in the search and when T. identified the appellant as the last person who was seen carrying away the deceased he immediately went to make a report at Maragua Police Station. He also accompanied the police officers to the scene where the body of the deceased was found.

John Waithaka (PW7) a neighbour of the deceased had also joined the search team that went to look for the appellant at his house and escorted him to the scene where the body of the deceased was found. A post mortem examination on the body of the deceased was carried out by Dr Julius Kimani Mwaro on 14th August, 2007. He formed the opinion that the deceased met her death through strangulation. The appellant was arrested by APC. Patrick Agulo after he was escorted by members of the public to Gakagi AP Police Post. The matter was investigated by PC. Charles Odhiambo (PW10). He escorted the appellant to Thika District Hospital for mental status examination. He also prepared the exhibit memo and delivered samples as per the exhibit memo to the Government Chemist which included among others: blood sample of the deceased, striped red T-shirt of the deceased, brown sweater of the deceased and soiled blue pants of the deceased.

The report by the Government analyst including the photographs that were taken at the scene, were all produced with the consent of defence counsel under the provisions of ***section 33*** as read with ***section 77 of the Evidence Act*** as the witnesses could not attend court without unreasonable delay. During cross-examination PC Odhiambo told the trial court that the Government Analyst report connected the appellant with the offence in that the blood sample on the appellant's jumper and trousers were found to have traces of blood groups "A" and "O". The blood group of the deceased was "A" whereas the appellant's was "O". The police had taken away the appellant's clothes when they arrested him.

Based on this information, the appellant was charged before the High Court Nyeri with the offence of murder contrary to ***Section 203*** as read with ***Section 204 of the Penal Code***. The particulars of the offence stated that on the night of 5th and 6th August, 2007, at Gachugu Village in Murang'a South District within Central Province, the appellant murdered **M.W.I**.

The appellant was arraigned in court before the High Court in Nyeri. He pleaded not guilty and after the prosecution presented its case from ten (10) witnesses, the learned trial judge found the appellant had a case to answer. The appellant opted to give unsworn statement of defence and he denied having had anything to do with the offence of murder that he was charged with; he indeed gave a defence of alibi. After considering all the evidence and submissions by both counsel for the State and the defence, the learned trial judge was satisfied that the prosecution discharged the burden of proof, as he expressed himself on page 25 of the judgment thus:

"It is perfectly clear to me taking into account the totality of the foregoing that there is sound circumstantial evidence to prove the guilt of the accused beyond reasonable doubt. There can be no other reasonable hypothesis of the accused's innocence. There are no other co-existing circumstances or factors that can weaken or destroy the inference of accused's guilt. Indeed there are no inculpatory facts

that are compatible with the accused's innocence."

The appellant was convicted of the offence of murder as charged and upon conviction he was sentenced to death.

Being aggrieved by the conviction and sentence, the appellant appealed. Mr Mwangi, learned counsel for the appellant, argued all the grounds of appeal together. Mr Mwangi faulted the evidence of T. (PW3), a minor aged fifteen years who he argued was not subjected to proper *voir dire* examination; there were contradictions in the evidence of T. that were not resolved; if there was proper evaluation of the evidence, the contradictions would have been resolved in favour of the appellant; the defence of alibi by the appellant, which was cogent, was not considered; the learned trial judge failed to consider that the appellant could have come into contact with the deceased's blood when he was made to sit with the body; the appellant was found to suffer from mental illness, therefore, he should have been sentenced at the President's pleasure.

On the part of the State; Ms Nyalyuka learned counsel for the State opposed the appeal. Counsel for the State submitted that the judge rightly accepted the evidence of T. who was not a child of tender age. She was not a victim but a witness. The evidence of T. was further corroborated by the report from the Government Analyst; the blood group of the deceased was traced in the clothes of the appellant. Finally, Ms Nyaluka submitted that the appellant's defence was properly rejected as a mere defence that did not dent the prosecution's case.

As this is a first appeal, by dint of the principles which are well settled in a long line of authorities, we are duty bound to revisit the evidence adduced before the trial court afresh, analyse it, evaluate it and arrive at our own independent conclusion but always bearing in mind that the learned trial judge had the advantage of seeing the demeanor of witnesses while hearing them and give due allowance for that. See ***OKENO VS REPUBLIC [1972] EA***. This case was decided based on circumstantial evidence.

None of the witnesses saw the appellant commit the offence. The evidence of T., a young girl aged fifteen years, is what connected the appellant with the offence. T. saw the appellant dishing out sweets to three children. He gave the sweets to two children and then asked the deceased to accompany him to the shops so that he could buy for her sweets. The appellant was seen by T. carrying the deceased on his shoulders and that is the last time the deceased was seen alive. The following day her body was found at about 7.30am under vegetation. The post mortem report showed the external appearance of the body had bruises on the neck, the right thigh and forehead. Clothes belonging to the appellant and the deceased were analyzed at the government chemist and the blood sample of the appellant was traced in the deceased's underpants.

The learned trial magistrate who heard the evidence of T. noted in the proceedings that there was no need to conduct a *voire dire* examination for reasons that the witness said she was fifteen years.

We have re-considered the evidence of T. against the submissions by Mr Mwangi who argued that her evidence especially during cross-examination revealed that she was a child of tender age and therefore the learned trial judge erred by failing to conduct a *voire dire* examination to test her level of intelligence which in essence would affect the weight and credibility of her evidence.

When T. gave evidence on 5th August, 2007, it was almost two years after the incident she witnessed. She said she was fifteen years old and that has not been challenged. What is challenged is the fact that she may have been thirteen years when the incident occurred however by the time she gave evidence she was fifteen years thus she cannot be categorized as a child of tender age. Mr Mwangi referred us to the case of ***KIBANGENY ARAP KOLIL VS R [1959] EA*** page 93 where the court discussed although as *per curiam* the circumstances under which the court may subject the evidence of a child of tender years to *voire dire* examination:

"There is no definition in the Oaths and Statutory Declaration of the expression 'child of tender of years' for the purpose of s.19. But we take it to mean, in the absence of special circumstances, any child of any

age, or apparent age, or under fourteen years."

The dictum by Lord Goddard, CJ in ***R VS CAMPBELL*** ***[1956] 2 ALL ER 272*** also emphasized that:

"Whether a child is of tender years is a matter of good sense of the court … where there is no statutory definition of the phrase approved."

We agree that *voire dire* examination is carried out by the trial court to establish whether due to the age of the witness they understand the essence of giving evidence under oath and of speaking the truth. The voire *dire* examination of a witness of tender years guides the court on whether the witness can be subjected to cross-examination, the protection to offer the child while giving evidence and of course the weight to attach to such evidence.

The learned trial judge who saw T. testify did not see the need for a *voire dire* examination for reasons that she was 15 years old which is above the threshold of the definition of a child of tender years. This is borne by the record of her evidence both in chief and under cross-examination her evidence is cogent. Having found no fault with T's evidence, the next issue to address is whether it was safe for the trial court to convict the appellant solely based on that evidence.

In the case of ***MAITANYI VS R*** ***(1986) KLR*** page 198 the following words were recited by this court from the decision of ***ABDALLAH BIN WENDO & ANOTHER VS REG*** ***[1953] 20 EACA***:

"Subject to well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances, what is recorded is other evidence whether it be circumstantial or direct, pointing to guilt; from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness; can sufficiently be accepted as from the possibility of error."

We find the evidence of T. was corroborated by the Government chemist's analyst's report that was admitted in evidence. It showed that the traces of blood that matched with the appellant's blood group were found in the clothes the deceased was wearing. This evidence cannot be by mere coincidence these were inculpatory facts that the trial judge found were incapable of any other hypotheses other than it was the appellant who murdered the deceased. See also the case of ***SAWE VS R KLR, 2003*** page 365:

"In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on."

On the issue of sentence Mr Mwangi implored upon us to consider that the appellant at one time suffered a mental breakdown and therefore, should have been sentenced as per the Presidents' pleasure. The record of proceedings shows that the appellant was admitted at the Nyeri PGH for mental treatment. On 25th September, 2008, the trial judge was informed the appellant was fit to plead and on 22nd October, 2008, the judge noted as follows:

"Court – I have seen a note from the consultant psychiatrist, Dr Owino dated 15th July, 2008 confirming the accused has now regained his sanity and was fit to plead. I now call upon him to plead to the charge."

There was no other indication that the appellant suffered mental insanity and he never even in his defence alluded to mental sickness. During sentencing, counsel for the appellant or the appellant did not offer any mitigation that the trial judge could have relied on to mete a different sentence from the sentence that is provided by the law.

In the result, we come to the conclusion that the appellant's conviction for the offence of murder contrary to ***Section 203 as read with Section 204 of the Penal Code*** was based on sound and sufficient evidence. The appeal, therefore, fails and is dismissed in its entirety. This judgment is delivered pursuant to the provisions of ***Rule 32***.

Dated and delivered at Nyeri this 5th day of July, 2012.

ALNASHIR VISRAM

JUDGE OF APPEAL

M. K. KOOME

JUDGE OF APPEAL

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

DEPUTY REGISTRAR