REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: BOSIRE, WAKI & VISRAM, JJ.A.)

CRIMINAL APPEAL NO. 219 OF 2004

BETWEEN

MUEMA MAKALI...APPLICANT

AND

REPUBLIC...RESPONDENT

Appeal from conviction and sentence of the High Court of Kenya at Machakos (Nambuye, J.) dated 16th December, 2003

in

H.C.CR.C. NO. 19 OF 2000)
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JUDGMENT OF THE COURT

The appellant herein, **Muema Makali**, was, after trial, convicted of the offence of murder contrary to **Section 203** as read with **Section 204** of the *Penal Code* and sentenced to death.

According to the information filed by the Republic, the appellant faced three counts of murder in that on the 19th August, 1999 at Kisaani village in Machakos District within the Eastern Province, he murdered **Catherine Mbithe Nzioki** (Catherine) in count one; **Fidelis Musau** (Fidelis) in count two and **Kennedy Nzioki** (Kennedy) in count three.

The prosecution presented the following facts before the High Court. Catherine, Fidelis and Kennedy (all deceased) were young children of **Raphel Nzioki** (PW1) (Nzioki). At the material time, the appellant was a domestic help employed by Nzioki. He was employed by Nzioki initially from February 1997 to August 1998. He returned six months later, sought re-employment, and was again employed in the same capacity, starting February 1999. He worked until August 1999 without any pay, then requested Nzioki for some money to help him build a house. Nzioki gave him Shs.4,500/=. He went home for about two weeks and returned on time.

On the fateful date of 19th August, 1999, Nzioki left home at about 2.00 p.m. to attend the funeral of a relative, leaving the three children in the care of the appellant. Moments after his departure, Fidelis, the youngest of the three children, rode on his bicycle to the shop of **Redempta Mueni Ndisya** (PW5)

(Ndisya), a neighbour, and one who knew the Nzioki family well. Fidelis asked for four loaves of bread and eight bottles of soda, prompting Ndisya to ask him if they were having visitors or a party. Fidelis answered in the negative. Ndisya then asked if his parents were home, and the young boy said ***"NO"***, smiled, and rode away. That was the last time Ndisya saw Fidelis.

Later in the afternoon, Ndisya was informed by people passing by her shop that Nzioki's house was on fire. She rushed there, found many people standing by, went over to the main house, peeped through the window, and saw bodies of three children burnt inside. She was shocked, and saw the appellant in the police vehicle. She knew the appellant as an employee of Nzioki.

At about 3.00 p.m. on the same day, **Jacinta Kanini Mutei** (PW3) (Jacinta), a form 3 student at Kisaani village, was on her way to the African Brotherhood Church to attend a choir practice when she saw smoke coming out of Nzioki's main house, and immediately proceeded there. She heard a groaning sound coming from the kitchen, then saw the appellant who she knew to be the employee of Nzioki run out of the kitchen towards the latrine, wearing no shirt and only a long trouser and holding a panga. She ran back to the main road, alerted other choir members, and returned with them to help put out the fire. Among those who accompanied her was **Susan Peter Kinyuma** (PW4) (Susan) who also saw the appellant inside the burning house. Later, Jacinta and Susan saw the appellant jump out of the kitchen window, wearing only an under pant, and disappear into the bush behind the house.

Meanwhile, members of the public alerted the District Officer, **Kennedy Mutuku** (PW6) (DO) who mobilized the police and led a team to Nzioki's house, and found the burnt bodies of the three children in the house, and later found the appellant in the bush, lying down with foam oozing from his mouth and nose. He had only his underpants on. A bottle of steladone cattle dip was found by his side.

Just before the appellant was taken to the hospital, Nzioki who had by then been informed by a neighbor of the fire at his house, arrived. He saw the appellant in the police motor vehicle, but did not talk to him. He peeped through the window, and saw three bodies burned beyond recognition.

According to **Dr. Patrick Lumumba** (PW7) who conducted the post-mortem examination on the three deceased children's bodies, death had resulted from extensive burns. He also observed that the head of each body had a fractured scull with extensively burned brain.

Following investigations by Sgt. Pombo (PW8), the appellant was charged with the offence of murder. **I.P. Lawrence Riungu** (PW9) took a charge and cautionary statement from the appellant, while **I.P. Francis Wambua Manthi** (PW10) took a statement under inquiry, in which the appellant admitted killing the children, and putting the house on fire.

In his unsworn statement, the appellant denied the offence, and claimed that he had smoked bhang to gain some strength; that he felt hungry after smoking the same; and that he sent Fidelis to buy some bread and sodas. While eating he felt unconscious, and eventually woke up in hospital four days later, not remembering anything that had happened.

At the hearing before us, Mr. E. Ondieki, learned counsel for the appellant, relied essentially on three arguments: first, counsel submitted, that at the time of the alleged offence, the appellant was intoxicated, having taken bhang, and "*another substance*" (presumably steladone, a bottle of which was found near him when he was arrested), and accordingly, at best, this was a case of manslaughter, not murder. He relied on **Section 13 (1)** and **(4)** of the Penal Code and urged us to substitute a conviction for manslaughter instead of murder. Secondly, Mr. Ondieki attacked the confession made by the appellant in the statement under inquiry, as having been recorded in a language the appellant did not understand. Counsel argued that the appellant only knew and understood kikamba, not English. Finally, Mr. Ondieki, submitted that the confession was made involuntarily, and relied on **Section 77 (7)** of the old Constitution which provided that no person who is tried for a criminal offence shall be compelled to give evidence at the trial.

Mr. M. O'Mirera, learned Senior Principal State Counsel, for the respondent, opposed the appeal,

submitting that the evidence against the appellant was overwhelming; that the confession had been properly obtained; that in any event, the confession had been corroborated by other independent and credible evidence; and finally, that there was no basis to the defence of intoxication.

This is a first appeal. The law enjoins us to revisit the evidence afresh and analyse it, evaluate it, and come to our own conclusion but always bearing in mind that the trial court saw and heard the witnesses and giving allowance for that (**Okeno v. R** [1972] E.A. 32.

Having reviewed the evidence on record, we agree with the learned Senior Principal State Counsel that there is overwhelming credible evidence to show that the appellant was the only one with the deceased children in the burning house; that he was seen by the witnesses jumping off the window, and that he eventually admitted the offences. Here is how the High Court concluded its assessment of the facts of the case:

"(i) On the court's assessment of the facts herein it is clear that there is no dispute that the accused was employed by PW1 at the material time.

(ii) There is also no dispute that he was left in the house with the three deceased children when PW1 left to attend a relatives funeral nearby.

(iii) It is also not in dispute that one of the children went and bought sodas and bread from a nearby kiosk run by PW5.

(iv) There is no dispute that PW1's main house was completely burnt down while the kitchen and the room where the accused used to sleep were partially burnt.

(v) No dispute that the three burnt bodies found in the house of PW1 belong to the three children of PW1. Indeed they were burnt beyond recognition but the circumstantial evidence point to their identity because PW1 left them in the home with the accused and when he came back he missed (sic) them and he has never seen them again. They were small children aged 7-15 years and could not have just disappeared from home without any trace. Further it has not been suggested that PW1 let any strangers in his home who could have burnt his house and whom nobody came forward to query about. It is therefore the finding of this court that the three bodies retrieved from the burnt down house of PW1 Raphael Nzioki belonged to:

1. Catherine Mbithe Nzioki

2. Fidelis Musau Nzioki

3. Kennedy Munyithya Nzioki

The said bodies were recovered by police and taken to the mortuary by PW8 among them and were identified to the doctor for post mortem by PW2. The consensus is that they were burnt beyond recognition. PW7 Dr. Patrick Lumumba is the one who carried out the post mortem".

With regard to the defence of intoxication, we agree with the learned Senior Principal State Counsel, that there is no such evidence in the record, nor was that defence raised before the trial court. The facts clearly show that despite the appellant's claim that he had smoked bhang, he had the presence of mind to send Fidelis, the youngest child, to buy bread and sodas, giving Fidelis Shs.500/= for the same, and later sharing the food with the children.

Finally, with regard to the argument that the confession made under the statement of inquiry was involuntary, and invalid, we are satisfied upon our review of the record, that this issue was fully canvassed in the trial within a trial to determine the admissibility of the confession, and that the High Court came to the correct conclusion when it stated as follows:

“That aside the prosecution also relies on two extra judicial statements namely the charge and cautionary statement taken by PW9 and the statement under inquiry taken by PW10. They were both repudiated and they were admitted in evidence only after a trial within a trial was held for each. This court is aware that these statements have been abolished by the amendment in Act No. 5 of 2003 which came into effect on 25.7.2003. However since these were dealt with before the amendment this still counts towards the evidence on record and will have to be dealt with and considered upon assessing the evidence on the record the old principles still apply to them and these are:

1. Once repudiated they have to be corroborated in material particulars, by some other independent evidence before it can be acted upon by the court to support a conviction.

2. Where the same is detailed to such an extend that it is nothing but true and it could only have been from a person who knew what he was talking about and a participant in the causation of the events complained of, it can be acted upon in the absence of corroboration if the court is satisfied that it is safe to act on the same support a conviction.

This court has applied those principles to the two statements. In the charges and cautionary statement in response to count 1 the accused allegedly said that it is true he murdered Catherine Mbithe by hitting her with a stick, in count 2 that he killed Fidelis Musau Nzioki by using panga while he killed Kennedy by hitting him with a panga. The fact of death has been corroborated by the fact that indeed the children died. However there is no corroboration on the use of weapons on them like a stick and a panga as the bodies were entensively burnt and PW7 was unable to say whether those fractures were caused before the burning or not. The stick allegedly used was not also recovered. PW8 recovered a panga which was alleged to have had stains of blood though burnt but no analyst report was availed to show that it was used on any human being. It follows that use of weapons has not been corroborated. As for the statement under inquiry the accused states that after smoking bhang he sent children for sodas and bread and they came to drink. This was confirmed by PW5 that indeed one of the deceased children came to her kiosk and bought 8 bottles of sodas and 4 pieces of bread. PW5 was surprised at the quantity and asked if they had a party or visitors at home and the child said no and then smiled and left.

3. On the smoking of bhang and then losing his senses has been confirmed by accused’s own unsworn evidence.

4. The burning of the main house and partial burning of the kitchen and the room where he used to sleep has been confirmed by the evidence of PW 1, 2, 3, 4, 5,6 and 8.

5. The fact of jumping out of the burning kitchen through the window was confirmed by PW3 and 4 who saw him.

6. The fact of running into the bush and vomiting was confirmed by PW3 and 4 as to the running and PW6 and 8 as to the recovery in the bush and seeing of vomit where he was lying.

7. The fact of becoming unconscious was confirmed by the evidence of PW6 and 8 and PW3 and 4 and PW1 and 2 that when brought from the bush he was unconscious and nobody knew he would reach the hospital.

8. Further corroboration is from the fact that there was opportunity to commit the offence.

9. The fact of infliction of injuries and disabling the children so that they cannot fight him has been confirmed by the fact that no screams were heard and no child ran out to escape”.

Finally, the High Court came to the following conclusion:

“The court has considered the totality of the evidence on the record and finds that accused’s

defence is that he took bhang for the first time and then had a black out and he did not know what happened there after. This has been considered in the light of the entire evidence of the prosecution and when this is done it is clear that if indeed accused had a black out he could not have remembered what he put in his charge and cautionary statement and then the statement under inquiry. The two represent the true state of affairs of what happened. The accused unlawfully caused the death of the three deceased children".

Having reviewed and analysed the evidence on record, we are in agreement with the conclusions reached by the High Court. The appellant murdered the three innocent children, left in his care by their father, in a most brutal manner, hammering their heads and leaving their bodies to burn beyond recognition. None of the arguments advanced by his counsel have any basis or validity; we reject the same, and uphold the conviction and sentence.

Accordingly, this appeal is dismissed in its entirety.

Orders accordingly.

Dated and delivered at Nairobi this 7th day of October, 2011.

S. E. O. BOSIRE
....
JUDGE OF APPEAL

P. N. WAKI
....
JUDGE OF APPEAL

ALNASHIR VISRAM
....
JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR