



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU**

Criminal Appeal 218 of 2006

JUDITH ACHIENG' OCHIENG'APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Kisumu (Warsame, J)

dated 31st July, 2006

in

H.C.CR.C. NO. 35 OF 2005)

JUDGMENT OF THE COURT

This is a first appeal by *JUDITH ACHIENG' OCHIENG'* from her conviction for the offence of murder contrary to *section 203* as read with *section 204* of the Penal Code. It had been alleged in the information filed by the Attorney General on 16th August, 2005 that the appellant did on 26th day of July, 2005 at Upper Kombewa sub-location in Kisumu District within Nyanza Province, murder Everlyne Awuor Ochieng. Everlyne, the deceased, was the appellant's two year-old daughter. As this is a first appeal, we are obliged to subject the evidence on record to our own evaluation and assessment and come to our own independent decision on the issues submitted before us. In so doing however, we must have due consideration and make allowance for the findings and conclusions made by the learned trial Judge who had the added advantage of physically seeing and hearing the witnesses testify before him - see *OKENO V R [1972] EA 32*. We shall shortly consider the factual issues raised in the appeal and the evidence in relation to those issues, but first, we dispose of one issue of law raised by the appellant in his "*petition of appeal*" (which ought to be a "*memorandum of appeal*"). The same issue was raised by the appellant's counsel *Mr. Obuo* in a "*supplementary memorandum of appeal*" in the following manner:

"1. That the learned judges(sic) erred in not finding that the entire trial was nullity in that Section 72(3) of the constitution was violated, the appellant having been held for more than fourteen (14) days."

Simply put, it was *Mr. Obuo's* contention that the appellant was arrested on 26th July, 2005, the day of commission of the alleged offence, but was first brought to court for plea on 17th August, 2005. Considering that the Constitution allows only 14 days maximum within which a suspect for a capital

offence can be held before being brought to court, the appellant was held by the police for eight days beyond the constitutional provisions and therefore, in line with authority, her trial should be declared a nullity thus resulting in her acquittal. The authorities cited before us in support of that proposition were DOMINIC MUTIE MWALIMU Cr. Appeal NO. 120 of 2004 (2008 eKLR 8) and PAUL MWANGI V REPUBLIC Criminal Appeal NO. 169 of 2006. (2008 eKLR 5). Happily for us, the same issue and the authorities cited, were fully considered by this Court in JAMES GITHUI WATHIACA & ANOTHER V REPUBLIC Criminal Appeal No. 115 of 2007 which Mr. Obuo did not have the benefit of considering since the decision was made subsequent to the hearing of this appeal. The Wathiaka decision was also followed in PROTAS MADAKWA alias COLLINS & 2 OTHERS V. REPUBLIC, Criminal Appeal No. 118 of 2007 and we have no reason to depart from the principle enunciated in those decisions. It is this:-

“The two appellants, right from the time their trial opened in the High Court, were each represented by an advocate. Their trial was before the High Court which by law is “the Constitutional Court” in Kenya. The appellants and their advocates knew or must have known that their constitutional rights had been violated. Yet the advocates raised no kind of complaint at all and as we have said the High Court is the Constitutional Court in Kenya and if the appellant’s advocates had raised the issue there, the Judge would have had to deal with the issue just as Mutungi, J. did in the NJOGU case, supra. When we asked Mr. Muthoni and Mr. Ng’ang’a why the advocates representing the appellants did not raise the matter with the Judge their answer was that they did not know. An information before a judge is different from a charge-sheet before a magistrate. The charge sheet would normally show on its face the date on which an accused person was arrested and the date on which he is brought to court. An information does not have on it details such as the date of arrest. So that a magistrate is able to see at a glance the relevant particulars from which it can easily be deduced if section 72(3) of the Constitution has been complied with. A judge by merely looking at an information, will not be able to tell when the accused person was arrested. The date on which the offence was allegedly committed is not necessarily the date of the arrest. We think we cannot equate advocates to poor and illiterate accused persons and where an advocate is present in court and does not raise such relevant issues, the appellant whom the advocate represents must be taken to have waived his or her right to complain about alleged violations of his or her constitutional rights before being brought to court. Different considerations must continue to apply where an accused person is unrepresented-----”

The appellant herein was represented by experienced counsel at her trial, although it would not matter if she was represented by a less experienced one, but nothing was said about the matter now being raised before us. We find no basis for her complaint at this late stage and we therefore reject that ground of appeal.

The appellant was tried before *Warsame, J.* sitting in Kisumu with the aid of three assessors as was mandatory in law at the time. One assessor was however disqualified before the trial was completed and the two remaining assessors differed in their opinions; one finding the appellant guilty of murder, the other totally exonerating her. The learned Judge was not bound by either opinion, and as stated earlier, he convicted the appellant without giving any reason for differing with the assessor who held a different opinion. In principle, especially where there is a unanimous opinion of assessors, a trial Judge ought to explain sufficiently his reasons for disagreeing with the assessors, - see KINUTHIA V R (1988) KLR 699 and KIHARA V REPUBLIC [1986] KLR 473.

What facts led to the appellant’s conviction?

They came from five prosecution witnesses and the appellant who gave sworn testimony and was cross-examined. It is curious that there is no record of any investigating officer in this serious case and none was called to testify. According to the post mortem carried out by *Dr. James Ang’awa Wafunde, PW5*, the deceased was a female African child aged about 1½ years. The child had died in New Nyanza General Hospital while undergoing treatment from severe burns which covered the entire region including the head, abdomen and limbs. The extent of the burns was 75% while the degree was estimated at 3rd degree burns. This means that the burns went beyond the skin to the level of muscles. There were no other external or internal injuries but the head had 3rd degree burns with some loss of hair but no skull fractures. In his view, the cause of death was cardio-respiratory arrest due to severe 3rd degree burns. He

did not rule out the possibility that such burns could result from an accidental fire.

There was no direct evidence on the origin of the fire that caused the child's death. The learned trial Judge therefore relied on circumstantial evidence related by two of the prosecution witnesses who were present at the scene. One was *Pamela Obadha Akello* who was the wife of the appellant's husband's brother. Her husband had died and she lived with her four children in the same homestead, but in different houses, as the appellant and the appellant's husband. The appellant had two daughters: the *deceased* and one *Florence Akinyi*. She made no mention of their apparent ages. In her recollection, the two children were taking tea in her house on 26th July, 2005 at 8.30 a.m. Also present in the house seated in a corner was her father-in-law, *Samuel Auma Ogila*, (PW3). The appellant at the time was in her house, about 40 metres away, and *Pamela* says the appellant stood at the doorstep of her house and called out to the two children who stopped taking the tea and went to their house. According to *Pamela*, the appellant then locked the two children inside the house and shortly thereafter she and PW3 saw smoke coming from the roof. They ran towards the house and PW3, broke the door. On entering the house she found clothes burning and the deceased on top of the clothing. The appellant and the other daughter were just standing silently next to the burning child. PW3 took the deceased and gave it to her and she ran out screaming. Neighbours came and put off the fire as the deceased was taken to Kombewa sub-District Hospital from where they were referred to New Nyanza General Hospital.

The recollection of PW3 is that he does not stay in the same homestead as Pamela and the appellant who are the wives of his grand sons. He went visiting there on 26th July, 2005 at 8.30 a.m. and found the appellant in her mother-in-law's house which is also within the same homestead. His recollection is that the two children were with the appellant but followed him as he went to Pamela's house where he and the children were offered tea. Before they finished taking tea, PW3 saw the appellant walking from the mother-in-law's house carrying a paper bag and she called the two children. She did not call them whilst she stood at her doorstep as stated by Pamela. She then closed the door of the house when the children entered. After some time he saw smoke coming from the roof of the house. Pamela said the children were being burned and they both rushed towards the house. He tried opening but the door could not open. He kicked it open and found a child burning on top of some clothing. The appellant tried to stop him from accessing the child but he elbowed her away, took the child, and gave it to Pamela. In his testimony, the appellant got hold of his private parts but he overpowered her and had her arrested by their clan elder. It was PW3's evidence that the child *Florence Akinyi* ran out of the house when he entered the house.

In cross-examination, PW3 stated that he found the deceased child with paraffin all over and his suspicion was that the appellant sprayed it on the child's clothes and lit the fire. According to him the child was 2½ years old.

In an apparent effort to establish a motive for the killing of the child the prosecution called the appellant's husband, *Kennedy Ochieng Obadha*, as PW1. He said he had had a misunderstanding with his wife on 24th July, 2005, two days before the fateful day. On that day he had arrived home with five hundred shillings but the following morning he found two hundred shillings missing and blamed the appellant for it. She denied having seen the money but they were in good terms for the next two days although he intended to take her back to her parents. On 26th July, 2005, he decided to borrow some 200/= from a neighbour and so he left his house at 8.00 a.m. At about 9.00 a.m. he heard screams from the direction of his home and rushed there only to find many people who informed him about the burning of his child who had been taken to hospital. His other daughter was there but not his wife. When she saw the deceased at Kombewa, she had been burned on the stomach and ribs.

It was in reliance on the evidence from those four witnesses that the learned trial Judge made the finding that it was the appellant who of malice aforethought caused the death of her own daughter. He stated in part:-

"The evidence of PW2 and PW3 is essential in that they were present within close proximity to the house where the incident took place. According to PW2 the act of the accused in locking herself with the two children at around 8.30 a.m. in the morning is peculiar. This is what PW3 called unusual incident,

which attracted his attention. It was unusual because the children had just woken up from sleep, therefore it was unusual time to expect a mother to make such children sleep. In my view it cannot be correctly said that the children were taken or called by the accused into the house for them to sleep. In my humble view a reasonable parent would expect his children to play outside since they had a long sleep, unless there is a rebuttal that the children were either sick or did not have peaceful and sound sleep during the night. I have no evidence to show the children were sick to expect to require them sleep at that particular time. Such behaviour of calling the children at particular time in my view rather suspicious.

To complete the true picture the accused locked the house from inside. The locking of the door from inside was a manifestation of an intention to undertake a certain act or omission. According to PW3, a few minutes after the accused locked herself with the two children, he noticed smoke coming from the roof of her house. He rushed to salvage the family but the door was locked from inside. And when he broke the door, there is ample evidence that the accused tried to stop him rescuing the burning child. The evidence is supported or corroborated by the evidence of PW2.”

In reaching that conclusion the learned trial Judge heavily criticized the appellant for her failure, not only to explain how the fire started, but also the extent and degree of the burns on the deceased. The justification for shifting the burden of proof was *Section 111(1)* of the Evidence Act. As stated earlier, the appellant testified on oath and was cross-examined. She and her husband, PW1, had two daughters: the deceased aged 2 years (born 19th May, 2003) and *Florence Akinyi* aged 6 years. On the morning of 26th July, 2005, she went to the river twice to fetch water leaving the deceased asleep and *Florence* playing outside in their compound. Her husband also left early that morning. Their house is a small tin-roofed mud-walled one which has no windows and it becomes necessary therefore to leave the paraffin tin-lamp on even during the day. The children slept on the floor, and are separated by a bed-sheet curtain from their parents’ bed. The appellant had just returned from the second trip of fetching water when she heard her child crying loudly and painfully. She rushed to the house and found the sheet curtain on fire. The house was full of smoke. As she frantically tried to look for the child PW3 and PW2 entered the house and started beating her as the fire raged on. Then one *Dickson Otieno* entered the house and removed her. He took her to Kombewa Police Station and she never saw the child again. She denied that she had started the fire intentionally, and made no admission that she locked up her two children in the house.

In his criticism of the appellant, the learned Judge stated:-

“The accused did not explain how a child of 2 years two (sic) was unable to walk and even temporary (sic) get away from danger was able to sustain 75% burns of 3rd degree. The accused had a duty to offer an explanation to discount how the child sustained such serious burns if she was left alone and unrestricted. A lot emerges from the evidence of PW5 is that the deceased met her death (unfortunate) due to fire inflicted on her over along (sic) period of time or under considerable temperatures. The evidence of PW5 is that the deceased had 75% burns which was 3rd degree burns. In cases of 3rd degree burns, it involves alot (sic) of heat at high temperatures. And the skin, the tissues under the skin and the muscles are all severally burnt. For myself I tend to believe that the child was placed on a bundle of clothes which had been gathered and was set on fire in a situation or manner, which might have restricted her movement to run away from danger. Having considered the evidence of the doctor it appears there is a strong and irresistible circumstantial evidence which tend to prove the case against the accused person. I am satisfied that the accused had the opportunity to commit the offence and did indeed commit the offence under my determination. The accused did not offer any reasonable or acceptable explanation as to how the child sustained 75% 3rd degree burns if the movement of the child was unrestricted. It means the child was set on fire in a manner, which restricted his movement to escape or minimize danger. The irresistible conclusion is that it was the accused who killed the deceased.”

In the end, the Judge concluded:-

“The evidence of the prosecution is more credible and believable when considered against that of the accused.”

The appellant raised six grounds in his *“petition of appeal”* while his advocates raised two more grounds in a *“supplementary memorandum of appeal”*, one of which has already been disposed of. The rest of the grounds were argued globally but the main challenge was on the conclusion made by the learned trial Judge on the basis of the circumstantial evidence before him. *Mr. Obuo* submitted that there was no sufficient basis for such conclusions and they were at best speculative. No reasons were given for disbelieving the appellant’s evidence or in assessing it on a balance of probability as the learned Judge apparently did. Furthermore, there was no proper investigation of the case to establish the cause of the fire; either through the government analyst who examined the burned material or the appellant’s daughter who was allegedly present and was capable of testifying directly. In the result, *Mr. Obuo* submitted, the circumstantial evidence available was not incapable of any other explanation and could not therefore prove a charge of murder to the standard required in law.

We have already stated that there was no direct evidence on the cause of the fire which, on the evidence, was the direct cause of the deceased’s death. The learned Judge was therefore right in resorting to circumstantial evidence. It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:-

- i) The circumstances from which the inference of guilt is sought to be drawn must be cogently and firmly established,
- ii) Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused,
- iii) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.

All that was stated by this Court in *OMAR CHIMERA V REPUBLIC Cr. A. NO. 56 of 1998*. In an earlier decision on the same principles, the Court stated:-

“In a case dependent on circumstantial evidence in order to justify the inference of guilt the incriminating facts must be incompatible with the innocence of the accused or the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of his guilt (Sarkar on Evidence – 10th Edition p 31). It is also necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference – TEPER V THE QUEEN [1952] AC 480 at page 489.”

Once the circumstantial evidence is subjected to those standards and it qualifies application, it is as good as any direct evidence to prove a criminal charge.

We have carefully reassessed the evidence on record and on our own evaluation we think the evidence fell short of the standards envisaged under the law. Firstly it is distressing that there was no investigating officer called to testify and we suspect that there was none who investigated the case. There would have been otherwise no difficulty in obtaining direct evidence on the cause of the fire, considering, for example, if the prosecution evidence be believed totally, that present with the appellant at the scene and before the fire started, was the appellant’s daughter, *Florence Akinyi*. There is nothing to show that she had any disability which prevented her from testifying or that a six year old was not possessed of sufficient intelligence to testify. There is otherwise no compulsion for the prosecution to call any number of witnesses to prove any fact. The provisions of *Section 143* of the Evidence Act, Cap 80, is clear on that. In our view however, the failure to summon *Florence Akinyi* in this particular case could only attract the presumption, which we draw, that she would have given evidence which was prejudicial to the prosecution case.

Furthermore, the evidence of the appellant's husband PW1 was not fully considered although it tended to support some relevant and material facts raised by the appellant in her sworn testimony. They include the fact that the small one-roomed mud-house had no windows, and it was dark during the day; that they used a tin kerosene lamp to light up the house even during the day; that they slept in the same place with the children and there is only a curtain separating their sitting area with the bed; that when he left home early that morning the deceased was drowsy; that there is no water in the compound and the appellant used to fetch water from the river in the morning at 8.00 a.m.; that he left her at his mother's place when he left home that morning; and that he left the tin lamp on when he left the house. Despite PW1's revelation that he had quarrelled with the appellant two days earlier over his missing 200/=, he stated in his evidence that they had resumed good terms before the fateful day. In all the circumstances, the appellant's evidence was not for outright rejection as it was subjected to by the learned trial Judge. Nor do we think, in the circumstances of this case, it was necessary to invoke the provisions of *Section 111(1)* of the Evidence Act. The appellant was entitled to remain silent but she opted to testify and testify on oath whereupon she was cross-examined. We think, even if she had any burden of proof, she discharged it and sufficiently established a weak link in the chain of circumstantial events that tended to incriminate her. The chain can only be as strong as its weakest link and it ceases to be reliable once the link is identified as it was in this case. There can be no doubt that the suspicion was high that the appellant had a hand in the death of her daughter. But that has never formed the basis of a conviction for the offence of murder. We have come to the conclusion that there are reasonable doubts established in this case and we give the benefit of those doubts to the appellant.

In the result this appeal succeeds. The conviction of the appellant is hereby quashed and the sentence of death imposed on her is set aside. The appellant shall be set at liberty forthwith unless she is otherwise lawfully held.

DATED and DELIVERED at KISUMU this 16th day of JANUARY, 2009.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

P.N. WAKI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR