REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU
Criminal Appeal 455 of 2007

SIMON KIPROP LELEI.....APPELLANT

AND

REPUBLIC .....RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at

Kisumu (Warsame, J) dated 19th December, 2006

in

H.C.Cr.C. No. 41 of 2003)

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JUDGMENT OF THE COURT

On 30th October, 2003, *Simon Kiprop Lelei*, the appellant herein appeared before the superior court at Kisumu (*Tanui, J*.) where he was charged with the offence of murder contrary to *section 203* as read with *section 204* of the Penal Code. The particulars contained in the information were that on 26th day of June, 2003 at about 4.00 p.m. at Miwani Central S/Location in Kisumu District of Nyanza Province he murdered *Hellen Cheptok*, "*the deceased*" herein. Prior to the date of plea, the appellant had appeared in court three times without plea being taken because the information had not been prepared. But from the date of his first appearance in court on 20th August, 2003 the appellant was represented by counsel, one *Mr. Omolo*. The case against him was that on the day of the incident, the deceased, accompanied by *Rabecca Chebet* (PW2) and *Rosa Cherotich Korir* (PW3) was from Kerunga market walking home through some sugarcane plantation when she met the appellant. Though PW2 and PW3 greeted him as they passed, the appellant did not reply. But when he reached the deceased who was behind the two above, he attacked her with the panga he had, cutting her all over the body. She died instantly. The appellant then went to Miwani Police Station where he handed over the panga to No. 49836 *Pc. Peter Berenge* (PW4) to whom he reported that he had used it to cut somebody. PW4 arrested and placed him in police cells. PW4 also took and kept the panga in safe custody. PW4 later visited the scene with other police officers, led by the appellant, where they found the deceased body. They collected it and took it to New Nyanza Provincial General Hospital mortuary where a postmortem was conducted thereon by *Dr. Dickson Mchana Mwalu Dindi* (PW5). The appellant was then charged in the superior court as herein stated.

He denied the offence in an unsworn statement and said he knew nothing about the commission of the offence, stating that on the day he is alleged to have committed the said offence, he had gone to a place called Salimia to visit his sister where he remained from 20th June, 2003 to 27th June 2003 when he went

back home. He was arrested in his house on 27th June, 2003 by police at 8.00 p.m. He testified that he could not have murdered the deceased who was his girlfriend. In his reserved judgment delivered on 19th December 2006, the learned superior court Judge (*Warsame, J.*) said:

"***I am in total agreement with*** *Mr. Atiang Siala* ***and*** *Sammy Opiyo* ***the two assessors who returned a verdict of guilty as charged. They stated that the beastly act happened during day (sic) broad day light before the astonished, hapless and innocent PW2 and PW3. The accused seemingly acted without mercy. The act was carefully planned and was executed like the accused knew the movement of the deceased.***

.....

All in all I am satisfied that the prosecution has proved its case beyond reasonable doubt. The charge of murder has been properly proved against the accused person.

The consequence is that I find the accused guilty of murder as charged. I sentence him to suffer death as prescribed by the law."

The appellant was aggrieved by that decision and filed this appeal before this Court on 2nd October, 2008. In his homemade memorandum of appeal and amended by a supplementary memorandum of appeal dated 9th December and filed herein on 10th December 2008 by his learned counsel, *Messrs Keengwe & Company Advocates*. It had 4 grounds of appeal, namely:-

"***1. THAT the learned Judge erred in law and in fact by entertaining proceedings against the appellant when it was apparent on the face of the record that the appellant's constitutional and fundamental rights of speedy trial as enshrined in the Constitution of Kenya had been violated.***

2. THAT the trial honourable Judge erred in law and fact in convicting and sentencing the appellant on erroneous and unsupported evidence of alleged eye witnesses as no identification parade was mounted as required in law.

3. THAT the learned Judge erred in law and in fact in purporting to corroborate *(sic)* ***evidence of PW2 and PW3 with that of PW4 which is inadmissible in evidence according to Evidence Act*** *(Cap. 80 of the Laws of Kenya).*

4. The learned Judge erred in law and in fact in concluding as to what was a murder weapon yet no evidence linked the allegedly murder weapon to the injuries sustained by the deceased."

In his submission before this Court, ***Mr. Keengwe*** informed the Court that he would only address us on ground 1 of the supplementary memorandum of appeal which dealt with the contravention of the appellant's fundamental and constitutional rights. However, when reminded to consider this Court's recent decisions on the subject, he decided to address us on all the grounds in the supplementary memorandum of appeal. On the constitutional issue learned counsel for the appellant submitted that although throughout the hearing of the case by the superior court the appellant was represented by counsel who did not raise the question of constitutional violations, mistakes of counsel should not be visited on the appellant. He asked Court to consider the issue and depart from its decision in ***Thomas Sankare Kelolon v. Republic, Kisumu Criminal Appeal No. 169 of 2006***. According to him, the information indicated the offence was committed on 26th June 2003 though all the evidence indicated it was on 25th June 2003 which shows a contradiction in the date of the commission of the offence. In his view, this was a serious contradiction which should result in the appellant's conviction being quashed. He stated that it was an error on the part of the learned Judge to attempt to "*corroborate*" the evidence of PW2 and PW3 with that of PW4 and in his relying on the evidence of the latter which was an inadmissible confession, and that after PW4 received the alleged murder weapon he did not carry out investigations in order to link it to the appellant. On these submissions he asked this Court to allow the appellant's appeal.

Miss Oundo, Senior State Counsel for the Republic opposed the appeal and submitted that there were two eye witnesses present when the offence was committed and they knew the appellant whom they saw attack the deceased. They recognized the appellant and their evidence was confirmed by that of PW4, the Police Officer. She submitted that the fact that PW4 received the murder weapon from the appellant or that he arrested the appellant and kept him in police custody did not amount to a confession. She stated that there was no mistaken identity in this case and that the learned Judge based his decision on the whole evidence of the prosecution witnesses. She submitted further that if there were any contradictions these were cured by ***Section 382*** of the Criminal Procedure Code. On the alleged constitutional violations she stated that these were non-issues since the appellant was represented before the superior court by counsel who did not raise any complaints over any constitutional violations. According to her the appellant was properly convicted.

Being a first appeal, our duty is to reconsider and re-evaluate the evidence as a whole and subject it to a fresh and exhaustive examination in order for us to form our own independent view of the case - ***Okeno v. Republic*** ***[1972] E.A*. 32.**

On the issue of the alleged violation of the appellant's constitutional rights no valid reason was placed before the Court which would warrant a departure from previous decisions such as ***James Githua Waithaka & Another v. Republic Criminal Appeal No. 115 of 2007*** (unreported) and ***Protas Madakwa*** *alias* ***Collins & 2 Others v. Republic, Criminal Appeal No. 118 of 2007*** (unreported) both of which were cited in the *Kelolon case, supra.*

It was clear from the evidence that there were two eye witnesses to the incident which resulted in the death of Hellen, the deceased. These were PW2 and PW3; and that the evidence adduced by PW2 was that of a child of tender years. The basic statutory provision relating to the evidence of children of tender years is found in ***section 19(1)*** of the Oaths and Statutory Provisions Act Chapter 15 Laws of Kenya, which states

"***19(1) Where in any proceedings before any court or person having by or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court, or such person aforesaid, understand the nature of an oath, his evidence may be received though not given upon oath, if, in the opinion of the court, or such person foresaid, understood he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth, and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced in writing in accordance with the provisions of section 233 of the Criminal Procedure Code, shall be deemed to be a deposition within the meaning of that section."***

There is no definition of the expression "*child of tender years* for the purpose of ***section 19*** of the Oaths and Statutory Declarations Act but Judges in the case of ***Kibageny Arap Kolil v R*** ***[1959] E.A. 92***, took it to mean, in the absence of special circumstances, any child of the age, or apparent age under 14 years.

The former Court of Appeal for East Africa had occasion to deal with the section in a number of cases most outstanding of which were:

(a) Nyasani s/o Gichana v R [1958] E.A. 190

(b) Kibageny Arap Kolil v. R [1959] E.A. 92

(c) Oloo s/o Gai v. R [1960] E.A. 86

Lord Goddard C.J. in his Dictum in ***R v. Campbell*** ***[1956] 2 ALL. E.R.*** stated that:

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

The procedure to be adopted before taking the evidence of a child of tender years was spelt out in the

above cases and re-enforced by the case of ***Kinyua v. R*** ***[2002] KLR. 256***. The first step is to ascertain if the child rendered understands the nature of on oath. If the answer is in the affirmative then his/her evidence is received either on oath or under affirmation. But if the answer is in the negative then the court should satisfy itself that the child is possessed of sufficient intelligence to justify the reception of the evidence and that he/she understands the duty of speaking the truth. In the second step, the evidence of the witness will be taken as unsworn.

In the case giving rise to this appeal the learned Judge carried out the requisite investigation and was satisfied the witness (PW2) understood the nature of an oath and this is why she was sworn and she testified on oath. Her evidence was corroborated in material particulars by that of PW3 who was an adult and who also saw when the appellant attacked and cut the deceased with the panga he had. The evidence of PW2 was in turn supported by the evidence of PW4 who testified that the appellant had gone to Miwani Police Station where PW4 was on duty on the date of the incident and he handed to PW4 the panga and reported that he had used it to cut a woman whom he had finished. Though in the appellant's defence he alleged he had travelled to a place called Salimia to visit his sister, the learned Judge considered it as against that of PW2, PW3 and PW4 and believed that of the prosecution witnesses which he stated had dislodged the appellant's said defence. He stated that the evidence of the prosecution witnesses was without doubt, direct and free from any mistake. In such circumstances we find no reason to interfere with the learned Judge's findings which were fully supported by the recorded evidence. This appeal has no merit and we order it to be dismissed in its entirety.

Dated and delivered at Kisumu this 8th day of May, 2009.

R. S. C. OMOLO

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

D. K. S. AGANYANYA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR