



COURT OF APPEAL OF KENYA

AT NYERI

CRIMINAL APPEAL NO 114 OF 2007

EVANS WANJAMA MBUTHIA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from judgment of the High Court of Kenya at Nyeri Lady Justice H.M. OKwengu, J dated 2nd October, 2006

in

H.C.CR.C. No. 6 OF 2005

JUDGMENT OF THE COURT

EVANS WANJAMA MBUTHIA, the appellant, was on 25th September 2006 convicted on two counts of murder by Okwengu J and sentenced to death. He faced charges of murder contrary to section 203 as read with section 204 of the Penal Code it being alleged that between the 4th and 6th days of January 2005 at Githiga village in Muranga District Central Province he murdered Teresia Waruinu Chege (Teresia) in count 1 and John Mwangi Chege (John) in Count II.

Teresia was aged 6 years old while her brother John was aged 8 years old. Their parents were Esther Chege (P.W.3) and David Wanjohi (P.W.4) Both the deceased, together with Patrick Mbuthia (P.W.5), aged 7 years old, were pupils at their local school known as Githiga. On the material day these children were on their way home from school when they were accosted by the appellant who was popularly known to them as “uncle” since he had previously been married to their aunt, one Jane Ngonyo and the two deceased children used to visit them. The appellant talked to the children and told them to go home and remove their school uniform and then go to his place so that he could give them money to go and buy a cake. The children went home where their mother PW3, gave them lunch after which they hurriedly left, allegedly to play. Some time later after 4.00 p.m. Gladys Wanjiru Muwa (P.W.7), who is a sister-in-law to the appellant, was seated outside her home when she saw John pass by and a few minutes later was followed by Teresia. They followed a road which led towards the home of the appellant as well as two other homes.

At around 6.00p.m. P.W.3 became alarmed when her children had not returned and yet it was getting dark. Being worried, she, together with her husband (P.W.4), ran about the village inquiring about the children but did not trace them. The next morning they again looked for the children and contacted relatives, but, again there was no trace of them.

At about 1.00p.m. Simon Mbuthia Wanjohi (P.W. 6) went to the appellant and asked him whether he had seen the deceased children. The appellant, however, denied having seen them. P.W.3 and P.W. 6 therefore decided to report the matter at Kevote Police Post.

On the 6th January 2005 P.W. 4 was on his way home from various futile searches when he passed by a bush near his home. Instinctively, he became apprehensive and on checking the bush he found the body of Teresia. He screamed and thereafter lost consciousness. When he came to, he went and reported the find to the police.

In response to the report, P.c. Joseph Wachira (P.W.10) and Cpl. Gitau proceeded to the scene where they recovered the body of Teresia which was lying inside some Napier grass. They observed that the body had some bruises around the neck. The officers, after a thorough search, also, recovered the lifeless body of John which was in a sack. On examining it they detected bruises around the neck. The two police officer`s then escorted the bodies to Murang`a District Hospital.

On 7th January 2005 Cpl. Stevenson Thairu (P.W. 11), Cpl. Dan Kagambo (P.W.12) and other officers from Murang`a CID took over the investigation of the case. They led the appellant to his house and upon searching the house they recovered a white and blue striped shirt which had some blood stains. They also recovered a blue T-shirt, similarly stained with blood. After Dr Kanyi Gitau had conducted a postmortem examination on the bodies of the deceased, he formed the opinion that in each case the cause of death was asphyxia due to strangulation. In respect of Teresia, Dr. Gitau noticed bruises on the labia majora and fluid in the vaginal cavity, while in the case of the John he noted that the anal opening was enlarged and lacerated. The doctor took a vaginal swab from Teresia`s body and an anal swab from that of John together with blood samples from both deceased. The appellant was also taken to Muranga District Hospital where a blood sample was taken. After the process Cpl Kagambo (P.W.12) labeled all the specimens together with the shirts recovered from the house of the appellant and prepared an exhibit Memo and escorted them to the Government analyst for further examination.

Stephen Matinde Joel Waebe (P.W.13) a government analyst received the samples and exhibits and carried out the examination. He found that the vaginal swab and the anal swab did not contain any semen or spermatozoa. However the blood sample of Teresia and that of the appellant were both of group `A` while that of John was group `B`. The shirts recovered from the house of the appellant were found to be both lightly stained with human blood of group `B`. P.W.13 formed the opinion that the bloodstains on the two shirts could have come from John.

When put to his defence the appellant gave an unsworn statement and called no witness. This, of course, was within his rights and the omission cannot be taken against him. He simply stated that the children who are said to have died never went to his home, and that he never saw them there.

The prosecution set out to prove that the appellant, with malice aforethought, caused the death of the two deceased. There was no eye witness account as to what exactly happened. But the prosecution set out to piece together certain events which it placed before the learned judge as circumstantial evidence connecting the appellant with the death of the deceased. In receiving that evidence the learned Judge remarked:-

“It is evident that there was no eye-witness to the commission of these offences. The evidence implicating the accused person is purely circumstantial. It is therefore necessary to identify the circumstances from which the conclusion of guilt may be drawn and consider whether the same has been established and if so whether the fact established are consistent only with the guilt of the accused or whether there are any co-existing factors which may weaken the inference of guilt.”

The first fact which the prosecution set out to prove was that the two deceased were seen going towards the house of the appellant and that their bodies were recovered in a thicket near the home of the appellant. The visit by the deceased children to that home was preceded by the invitation by the appellant to buy them a cake. The second fact which the prosecution set out to prove was that traces of human blood `B` on a white grey stripped long sleeved shirt and a `T`- Shirt recovered from the house of

the appellant which blood was of the same blood group as that of the deceased John thereby leading to the conclusion that the bloodstains must have come from John. Although no Rhesus factor or D.N.A. test was done, the fact that the appellant's clothes were stained with the blood of the same group as that of the deceased John is consistent with the evidence of P.W. 5 and P.W. 7, that the appellant had come into contact with the deceased child.

In convicting the appellant the learned trial Judge held:-

“There was evidence that the accused was formerly married to an aunt to the deceased children but that they had parted ways. There was no evidence as to what caused the break up in the marriage. However that fact that the mother of the deceased children had warned the children not to go to the house of the accused again is an indication that the relationship had soured.

The manner in which the offence was committed, the assault on the children and the disposal of the body were all evidence of malice aforethought. Although only traces of blood from the blood group of the 2nd deceased were found on the clothing of the accused. It is clear that the two deceased children were together and that the assault on the children and their deaths were done in the same manner and the bodies disposed off in the same place... the deaths were caused by the same person. I concur with the unanimous opinion of the assessors and find that the person who caused the death of the two deceased was the appellant”

Mr Ndirangu for the appellant submitted before us that the circumstantial evidence did not point irresistibly to the appellant's guilt as there was other evidence which if it had been properly considered by the learned trial Judge conviction could not have been sustained.

We find in the light of the evidence adduced before the trial court that the prosecution proved beyond any reasonable doubt that the appellant lured the two deceased with an offer of a cake and that they were last seen going towards the appellant's home. Again, the conduct of the appellant when confronted with the evidence of the missing children was strange, and indeed, suspicious. Moreover, the appellant did not put forward some explanation as to why John's blood stained clothes were recovered from his house.

In convicting the appellant the learned trial Judge was properly guided by the principle that in such a case like this one where circumstantial evidence is to be relied upon by the prosecution the evidence must irresistibly point to the appellant to the exclusion of all others within the guidelines set out in **R v Kipkering Arap Koske & Another 16 EACA 135** in order to found a conviction. In that case, the predecessor of this Court declared:-

“In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt”

In our judgment, after carefully re-examining the evidence upon which the appellant was convicted, we are satisfied that the evidence on record meets the legal requirements of circumstantial evidence to warrant or justify the conviction of the appellant. We therefore reject the submission by Mr. Ndirangu. Further, we think that taking the evidence tendered before the trial court as a whole we are satisfied that the prosecution had proved the case against the appellant beyond any reasonable doubt and the conviction is safe and sound. We uphold it.

In the result, the appeal is rejected and is hereby ordered dismissed.

Dated and delivered at Nyeri this 10th day of July, 2009.

P.K. TUNOI

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

J.G. NYAMU

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR